

To us although the house was built by the respondent, its ownership is not with him. It is with the appellant because this was built with her money. Although the appellant did not appeal against the finding of fact, we are, however, justified in making our own finding on the issue because no finding was made on it by the courts below.

Before we conclude this judgment, there is, however, one other matter to be considered. The learned Magistrate in the court below awarded \$160.00 as damages against the respondent for holding over of the premises. But the calculation was based on her erroneous finding that the respondent had an interest in the construction of the house and that this interest expired some five years after the date of the notice to quit, i.e. on February 21, 1981 (the date of the notice to quit being February 21, 1976). In other words, the \$160.00 damages were awarded because the respondent was holding on the premises for seven months commencing from the date of expiry of his interest, which was on February 21, 1981 to the date of the judgment of the learned Magistrate, which was on September 23, 1981. In our view this award cannot stand. The damages to be awarded, if at all, should be calculated with effect from the date when the respondent, not being the owner of the house, was required by the appellant to give up possession of the house as asked for in her statement of claim. But there is no evidence led by her at all on the question of damages, as the case was fought in the courts below on the basis of the question as to whether it was the appellant or the respondent who built the house. Thus, if substantial damages have to be awarded, the case must be sent back to the learned Magistrate for her to hear evidence and assess damages accordingly. In our view this course of action is impracticable because of the time lag and the possibility that the Magistrate who heard the case is no longer available. On the other hand since as a matter of law the appellant is entitled to damages for holding over, we feel that a token damage of \$10.00 will not be out of place.

Hence, our judgment is that the appellant is entitled to obtain vacant possession of the land and the house, a token damage of \$10.00 and that the appeal is therefore allowed with costs both here and in the courts below and that the deposit should be refunded to the appellant.

Appeal allowed.

Solicitors: Sri Ram, Zulkifly & Kumar; Chan & Chia.

A TARA RAJARATNAM v. DATUK JAGINDAR SINGH & ORS.

[O.C.J. (Abdul Razak J.) July 17, 1982]
[Johore Bahru – Civil Suit No. 284 of 1979]

B *Contract – Agreement by plaintiff to transfer land as security for advance of money – Memorandum of transfer executed – Undertaking by defendant not to sell land to anyone else for one year – Defendants advocates and solicitors acting for plaintiff – Undue influence – Action for breach of contract, breach of trust and fraud – Principal and agent – Collusion – Contracts Act, 1950, 16(1) & (2), 17, 20 – Evidence Act, 1950, s. 10 – National Land Code, s. 340.*

C *Legal Profession – Solicitors committing grave and abominable acts of contempt against court – Deceiving the court – Punishment – R.H.C. 1980, 0.52 r.1.*

D In this case the plaintiff had agreed to transfer her land as security for an advance of \$220,000 to the plaintiff or her account. The money was to be used to pay off a charge on the land and also to pay the first defendant an amount payable by the brother-in-law of the plaintiff for whom the first defendant had stood surety in getting an advance from a bank. The first and second defendants were advocates and solicitors and acted for the plaintiff in preparing the necessary documents. The land was transferred to the 2nd defendant by a memorandum of transfer but there was an agreement adding that the land was not to be sold to any other person without the consent of the plaintiff and the 2nd defendant undertook to transfer the land to the plaintiff in the event of her paying the sum of \$220,000. The defendant assured the plaintiff that although the transaction was in the form of a sale, the land would always remain a security. He also assured her that although the period of repayment was limited to one year, the property would be transferred to her nevertheless even after it. It was alleged that the 2nd defendant had instead and in complete disregard of the memorandum and its addition and in collusion with the 1st defendant unlawfully and inequitably transferred the land to him and later the 2nd defendant in order to defeat the plaintiff's title in collusion with the 3rd defendant, also an advocate and solicitor, unlawfully and inequitably transferred the land to the 3rd defendant. The 3rd defendant brought an action for possession of the land against the plaintiff and obtain an order for possession. The plaintiff appealed against the decision but being out of time her appeal was dismissed. She then filed caveats against the land but on an application by the 3rd defendant the caveats were set aside (See [1979] 1 MLJ 173.) The plaintiff then brought the action against the defendants for breach of contract, with undue influence, for breach of trust and for fraud.

I **Held:** (1) in this case there was privity of contract between the plaintiff and the 2nd defendant. On the facts the 2nd defendant in fact bought the land on behalf of the 1st defendant. The 1st defendant was the undisclosed principal and the 2nd defendant was his agent and therefore the 1st and 2nd defendants were liable on the contract;

(2) in this case the 1st and 2nd defendants had acted as solicitors for the plaintiff and the burden of proving that the contract was not induced by undue influence was on them as they were in a position to dominate the will of the plaintiff. The defendants had not discharged that bur-

den and the plaintiff was therefore entitled to a repudiate the contract;

(3) in this case the 1st and 2nd defendants as solicitors were entrusted by the plaintiff with the holding of the document of transfer as security. Since only the equitable interest was with them they were constructive trustees of the property and as they had transferred the land to themselves they had committed a breach of trust;

(4) the defendants in this case were guilty of fraud against the plaintiff;

(5) Judgment should therefore be entered for the plaintiff as prayed;

(6) in this case on the facts the three defendants had committed a grave and abominable act of contempt against the courts as they had made the courts the subject of their deception and mischief and they should be punished for it. The defendants must be committed to prison for a period of 2 years.

[Editorial note: The respondents' appeal against summary conviction and sentence for contempt of court was allowed. See *Jaginder Singh & Ors. v. Attorney-General* [1983] 1 M.L.J. 71, F.C. Their appeal against the main findings of Abdul Razak J. was dismissed by the Federal Court on May 16, 1983. They have since obtained leave to appeal to the Privy Council.]

Cases referred to

- (1) *Pole v. Leask* (1863) 33 L.J. (Ch.) 155.
- (2) *Wright v. Carter* [1903] 1 Ch. 27; [1900-3] All E.R. Rep. 706.
- (3) *Haji Abdul Rahman v. Mahomed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.
- (4) *Assets Co. Ltd., v. Mere Roihi* [1905] A.C. 176.
- (5) *Butler v. Fairclough* (1917) 23 C.L.R. 78.
- (6) *Saminathan v. Pappa* [1981] 1 M.L.J. 121.
- (7) *Rex v. Weisz* [1951] 2 K.B. 611.
- (8) *Linwood v. Andrews & Moore* (1888) 58 L.T. 612.
- (9) *Balogh v. St. Albans* [1975] 1 Q.B. 73.

CIVIL SUIT.

H.E. Cashin (*Subra Naicker* with him) for the plaintiff.

Chin Yew Meng for the 1st defendant.

Ronald Khoo for the 3rd defendant.

2nd Defendant in person, assisted by *C. Paramjothy*.

Cur. Adv. Vult.

Abdul Razak J.: A Dr. Das was one person who seemed to have embarked in life resigned to the inevitability that however hard he tries its many hazards would somehow sometime involve himself in some form of financial strait or another. That in retrospect seems somewhat to be the circumstance in which this case story began, because one day in 1973 he was driven into the novel idea of starting a computer medical centre in Singapore called *medidata*. But no sooner had his project been launched, when he began to encounter with difficulties. The undertaking required a lot of funds to get it started and to keep it going; it soon became clear

to him that he had not sufficient means to finance it alone. He was rendered impecunious. He had to borrow and borrow he did. He sought his friends for assistance and one of his friends (at least he thought he was) was Datuk Jagindar Singh, an Advocate & Solicitor, the first defendant in this case. He knew him since their student days in England. Without much ado, the 1st. defendant agreed to back him. He would stand as his guarantor to the Hongkong and Shanghai Bank Singapore (henceforth referred to as HKB) for an overdraft of up to a ceiling of \$120,000/-. There was no time limit set on the repayment by the Bank, but the understanding between Das, P.W.(2) and the 1st. defendant was that it was for a short period only. P.W.(2) drew on the overdraft but later the 1st. defendant called upon P.W.(2) to clear it but he was unable to do so. Following in the wake of that overdraft, P.W.(2)'s sister-in-law one T. Rajaratnam, nam, the plaintiff in this action, whose husband was P.W.(2)'s brother, in circumstances which will be related to shortly, was later to transfer her land to Datuk Suppiah, the 2nd defendant the 1st. defendant's legal firm's partner and the former later transferred it to one Arul Chandran, another Advocate & Solicitor practising in Singapore, the 3rd. defendant in this case. According to the writ filed by the plaintiff, the land was to be used as a security for an advance of \$220,000/- to the plaintiff or her account. For this purpose she signed a number of blank and undated transfer and other related forms. Although the manner in which this was done, was in the form of a sale, she was assured by the 1st defendant that the land would always remain as a security. He also assured her that although the period of repayment was limited to one year, the property would be restored to her, nevertheless, even after it. There was a memorandum which she signed accompanying the transfer forms. Under the memorandum and the manuscript (P.30 and 31) the 2nd. defendant was to pay Chung Khiaw Bank hereinafter called CKB \$103,000/- to discharge the plaintiff's debt and was to pay \$110,000/- to the 1st. defendant who will pay HKB to discharge P.W.(2)'s debt. The 2nd. defendant was also to pay \$6,341.50 to the Bank for interest and the balance if any, to be paid to the plaintiff, making a total payment of \$220,000/-. The memorandum P.30 and P.31 are as follows:—

"P.30

I, TARA RAJARATNAM (f) NRIC No. 2317344 of No. 76, Main Road, Kulai Johore, proprietor of the land described in the Schedule below and the house erected thereon and known as KLBSK 681, Kulai Besar, Kulai, Johore, confirm that the consideration of \$220,000.00 referred to in the Transfer executed by me in respect of the said land in favour of PAKRISAMY SUPPIAH of No. 33, Jalan

Keruing, Kebun Teh Park, Johore Bahru is arrived at as follows:—

- (a) in consideration of the said P. SUPPIAH paying the sum of Dollars \$103,658.44 which is the amount due from me to the CHUNG KHIAM BANK Kulai Branch, as at 8.3.74 as stated in their letter dated 14.3.74 which is attached herewith and marked "A" on the Charges executed by me in their favour and a further sum of \$6,341.56 (making in all \$110,000/-) part of which is for additional interest payable to the said bank as from 9.3.74 to the date of Transfer and the balance is to be received by me;
- (b) a further sum of \$110,000.00 is in consideration of the said P. SUPPIAH paying Datuk JAGINDAR SINGH of No. 41, Jalan Waspada, Johore Bahru, being the amount payable by my brother-in-law Dr. KRISHNA SHIVADAS (also known as Dr. DAS) of No. 25, Jalan Waspada, Johore Bahru, to the said Datuk JAGINDAR SINGH who will be paying to the HONGKONG & SHANGHAI BANK, Collyer Quay, Singapore the sum of \$110,000.00, (which I hereby agree) being the loan granted to my said brother-in-law by the said Bank on the guarantee given by the said Datuk JAGINDAR SINGH.

P. 31

The Schedule referred to above.

Mukim	Lot No.	Description and No. of Title	Share of land (if any)	Registered No. of lease/ sub-lease (if any)	Registered No. of charge (if any)
Senai		Certificate of Title No. 13817			
Kulai-	6025	for area 5A, QR. QQP. or thereabouts	whole	nil	nil

Dated this 30th. day of March, 1974.

Sgd.
Witnessed by
K.V. Devan.

Sgd.
Signed by the above-
named Tara Rajaratnam

I, the above named Pakrisamy Suppiah hereby confirm, agree, and undertake *not to sell the said land and house to anyone for one year* without the consent of the said Tara Rajaratnam (f) and further undertake to transfer the said land and house to her within one year in the event of her paying me the sum of \$220,000/- (Dollars two hundred and twenty thousand only) the consideration mentioned as above.

Sgd.
C. Sivananthan

Sgd.
P. Suppiah"

(The undertaking is in manuscript and will be referred to as P.31).

The averment says that the 2nd. defendant had instead with knowledge of these facts, and in complete disregard of the memorandum in collusion with the 1st. defendant, nevertheless unlawfully

A and inequitably transferred the land to him and later the 2nd. defendant in order to defeat the plaintiff's title in collusion with the 3rd. defendant unlawfully and inequitably transferred it to the latter. She claimed that the defendant had in so doing acted in breach of contract and/ or exercised undue influence, committed a breach of trust and/or fraud on her. She asks for a declaration that the transfers were null and void and that the defendants were trustees of the said property for her benefit. She asks for an inquiry into the proceeds of sale of the land from the 3rd. defendant to third parties which had taken place and that such monies be held on trust for her and that any land that had not been transferred and sold to third parties be retransferred to her. She also asks for damages for the breach of agreement, trust and/or fraud and interest. Devan died after this action was filed.

D The defendants in their averment said that the land was in fact sold to the 2nd. defendant because P.W.(2) was unable to pay his debt of \$110,00/- to HKB on the \$120,000/- guarantee. P.W.(2) had consequently arranged with his brother Devan when faced with this predicament to sell the land which the deceased Devan said belonged to him but was in his wife's name, at the price which was later agreed at \$220,000/-. A transfer was subsequently executed by the plaintiff with the consideration at \$220,000/-. The defendants were on terms with the plaintiff regarding the one year's grace to repay but said that it was limited, contrary to what the plaintiff said, to one year only and from the March 30, 1974. The 1st. defendant said that when the 1st defendant wanted to pay off the HKB he discovered that the overdraft was not \$110,000/- as mentioned in the memorandum but about \$121,000/-. The 1st. defendant said he informed P.W.(2) and the deceased about this and then the latter said to the 2nd. defendant that he could ask the 1st. defendant to pay off whatever the overdraft was and the consideration would be adjusted accordingly. The deceased said he wanted to continue to operate the account with the CKB for about a year. He would like to stay on the property and would pay compensation and he was looking for buyers, and if he could find one, he wanted to transfer the property direct to the buyers. They denied that the transfer was intended to be a security, and also of the alleged assurances given by them except on the admission that the transfer was undated for the reasons they contended that since there were three charges on the property in favour of CKB these had to be discharged first before the transfer could be registered. They said that before the expiration of one year from March 30, 1974 the 2nd. defendant asked the de-

ceased whether he would be purchasing the property or find a buyer for it. The deceased told him that he and his wife could not find a buyer nor find the means to purchase the property but reiterated he wanted to stay on the land up to the end of 1975 for which he would pay compensation. He also told the 2nd. defendant that he would pay compensation. He also told the 2nd. defendant that he would cease operating the overdraft account in June 1975 with CKB and that when he did so he would bring the overdraft down to \$92,000/- and compensation was agreed at \$6,180/-. Then on the February 2, 1975 the 2nd. defendant filed a caveat against the land. He said he was told by the plaintiff bank's solicitor Yeow & Chin sometime in June 1975 that they were also acting for the plaintiff and that the charges would be discharged on payment of \$92,000/-. The 2nd. defendant duly paid the amount and later transferred the land to him and subsequently to the 3rd. defendant.

The events that took place subsequent to the transfer would have a bearing on the suit itself. As already stated on the March 26, 1976 the 3rd. defendant in C.S.146/76 filed an action in the Sessions Court against the plaintiff for possession of the subject land. The court gave possession to the defendant. The plaintiff appealed against the decision. It came before Anuar J.C. as he then was. He dismissed the appeal. The plaintiff appealed to the Federal Court but, being out for time, her application was dismissed. She then applied for an extension of time but it was also dismissed. She then in O.M.17/76 made an application to the High Court for a stay of execution pending appeal against the order made by the Sessions Court for possession. This was also dismissed. In the meantime the plaintiff had filed 3 caveats against her land; the third came before Syed Othman J. (as he then was), on an application by the 3rd. defendant to set aside the caveat. It was allowed. The plaintiff appealed against the decision, but later withdrew her appeal! She then filed an action in the High Court in 261/77 against the defendant. The appeal was dismissed by the High Court. There was no appeal against the decision. The plaintiff then filed the present action 284/79. The matter was again dismissed on ground of *res judicata*. But the Federal Court allowed the appeal. It is also to be noted that on the 6th day of the trial the 3rd. defendant amended his defence to say that he was a nominee of the 1st. defendant. At the initial stage Mr. Chin acted as his Counsel. He discharged Mr. Chin. He then acted on his own behalf until Mr. Ronald Khoo was retained. Mr.

A Ronald Khoo was acting as his Counsel at the time of the amendment.

B There are, as evident, three claims against the defendant for breach of contract, with undue influence, for breach of trust, and for fraud. The facts bearing on each claim are basically the same. They would thus tend to overlap in some instances. However, the need to identify the points raised would only require them, where necessary, to be repeated, in the course of my judgment.

C The plaintiff in her evidence recounted the events and the circumstances which led to her signing the memorandum. She said that on the March 30, 1974 three people came to her house which was situated on the land the subject of the present dispute. She said the three were the first and second defendants and another one, Sivanandan, D.W.(4). They were introduced to her by the deceased. She knew they were lawyers. Before that time she had come to know that P.W.(2) was indebted to the Hongkong Bank in the sum of \$110,000/-; that the 1st. defendant had to pay Hongkong Bank also about \$110,000/-. Also, that she was to put up her land for security for the two sums. When she was handed P.30 she read it and she saw the word "transfer" in it. She asked the 2nd. defendant why it was a transfer when it was going to be a security. The 2nd. defendant said the security was by way of a transfer. Then she asked how she was going to get the land back once transferred. He replied that P.W.(2) would pay the debt to him (the 2nd. defendant) and she would get back the land. He did not say when she was going to get the land back. She asked if P.W.(2) could not pay, what would happen. He said he could sell the land, pay off the debt and the balance could be used to buy some property nearby. She was still not happy. She told him she had five daughters and she was holding the land for them. Then, he asked P.W.(4) to write something on P.30, in manuscript (P.31). It was then signed by the 2nd. defendant and P.W.(4). She saw the one year in the manuscript, the period she was to repay and get her land back. She asked him why one year had been specified. He told her she could get back the land anytime she liked. He did not want her land. But she expected then, or in a day or two that the sum stated in the memorandum would be paid. He did not tell her when he was going to pay. She signed P.30 and 31 after he had asked the questions. There were also transfer forms which were not filled up; also some typed papers with empty spaces which she signed. There were 2 or 3 blank sheets of paper. She asked the 2nd.

defendant about the blank papers. He told her that some type-written letters must accompany the transfer forms which she signed. After signing the memorandum and the manuscript she still received demands from the CKB for payment. The interest was at 11%. It was something under \$1,000/- p.m. By the end of 1974 the \$110,000/- had not been paid. By 1975 the CKB kept pressing. On the March 28, 1975 she made payment of \$40,000/- to CKB and the Bank's debt was consequently reduced to \$90,000/- to \$91,000/-. She said the deceased borrowed the \$40,000/- balance from one Anandan, P.W.(10). She said P.W.(2) saw him after the filing of this writ; he never told her that the debt to the 1st. defendant had in part or at all been paid by the 2nd. defendant. She came to know that the land had been transferred to the defendant in 1975 when her husband brought home the returns from the tax office. The deceased said to her that he would go and see the 1st. and 2nd. defendants. Later the deceased recounted that the 1st. and 2nd. defendants told him they were keeping the land for security. At that time the deceased did not tell her that the 1st. and 2nd. defendants had said that they had sold the land to someone else. She still thought that she would be able to get back her land in any event. Subsequently, she came to know by letter in March 1976 from the defendant (Page 65) that the land had been transferred to the 3rd. defendant.

Shortly after receiving the letter she was served with the summons from the 3rd. defendant to vacate the land. She said she had not received any balance as stated in P.30 Para A of \$6,000/-. She denied also having confirmed on July 5, 1975 as stated in P.56 that the building on the land was also included in the transaction. She said in answer to the 2nd. defendant that P.56 could have been one of the blank papers she signed because her signature was there. She had not gone before the 1st. defendant as advocate & solicitor to sign it. She had never seen the 3rd. defendant. There was no arrangement between P.W.(2) and her that P.W.(2) was to pay her \$110,000/-. Neither did she know whether P.W.(2) had any arrangement with the deceased to pay the money. She said that in the early part of 1965 her property was given to one H.L. Tan as security. At that time the land was registered in her husband's name. The deceased borrowed from H.L. Tan for \$40,000/- without interest. The debt was paid in 1965, and it was retransferred to her instead because she paid for most of the money. She sold her jewellery; she borrowed \$11,000/- from her sisters. The deceased

A only paid \$4,000/-. She built a house on the land in 1965.

The 1st. defendant restated the circumstances mentioned in the averment by which P.W. (2) came to borrow from him. He gave a long story about how after the loan P.W.(2) was evading payment and the several excuses P.W.(2) allegedly gave for not clearing the loan. Then there was the suggestion by P.W.(2) to sell his brother's land. He did not say as he did in his defence that P.W.(2) *arranged* for his brother to sell the land. He merely said that P.W.(2) only said he would ask the deceased to get in touch with him. He said that on the 10th. March, 1974 the deceased came to his office. The 2nd. defendant was present. He was prepared to sell the land but suggested that if a bigger mortgage could be obtained then the extra money could be used to clear the overdrafts of P.W.(2) as well as his. The letter P.27 was therefore written to CKB asking for the title deeds, with a view to getting an increased overdraft. It reads as follows:—

"P.27

E SUPPIAH & SINGH
Advocates & Solicitors,
Commissioner For Oaths
and Notary Public.

TEL: 2254

No. 2-D, Jalan
Ah Fook,
Johor Bahru,
West Malaysia.

P. Suppiah, S.M.J
DATUK JAGINDAR SINGH

F Our Ref. No.(134) F.1074 SU.

Date: 12th. March
1974.

Messrs. Chung Khiaw Bank Limited,
Kulai,
Johore.

G Dear Sirs,

We act for Madam Tara Rajaratnam who had been given overdraft facilities up to a maximum of \$110,000.00 by your Bank in 1966 on a Charge of her property. The overdraft account is being operated by her husband Mr. K. V. Devan (Account No. 146) of 681 Kulai Besar, Kulai.

H As our client wishes to pay off the Charge by charging the said property for an increased amount, we would appreciate it very much if you could let us have a statement showing the amount due to your Bank and the title deeds to the property on our usual undertaking for the above purpose.

Yours faithfully,

Sgd.

c.c.

Madam Tara Rajaratnam,
Kulai Besar, Kulai,
Johore.

Mr. K.V. Devan,
Kulai Besar, Kulai,
Johore."

Then he obtained the deeds from CKB. He approached the HKB but his attempt was abortive. He told the deceased and the latter said he would sell the property and he could call at his office. The deceased came on the 23rd. March. After negotiations it was agreed by the deceased to sell the land at \$220,000/- and the terms and the method of payment were agreed to. The 2nd. defendant was interested in buying the land. D.(1) the valuer's report was therefore produced by the deceased. 2nd. defendant told the deceased that the valuer valued the property at \$48,000/-. He said that the house should not be considered because the land would be developed and it would be demolished. The deceased asked what was 2nd. defendant prepared to offer. He said \$220,000/-. That was agreed. The deceased asked the 2nd. defendant to prepare the necessary documents to give effect to the arrangement. The 2nd. defendant was to pay \$110,000/- to HKB and \$103,000/- to CKB. This was later embodied in P.30. He and the 2nd. defendant came back on March 30 to the house and the 2nd. defendant showed to the plaintiff the transfer and other related documents. The plaintiff went through them. Then the plaintiff asked the deceased to go outside. Later they came back and the deceased said the plaintiff wanted the option to repurchase and that the Medidata was picking up business and within a year the property could be repurchased. As a result the 2nd. defendant dictated the manuscript P.31 to Sivanandan D.W.4. What 2nd. defendant dictated was in the hearing of everyone else. The plaintiff then signed P.30 and 31. She had also signed the confirmation P.56. He did not act for plaintiff or the deceased in respect of P.27. This was merely to assist the deceased to obtain a bigger mortgage. The \$92,000/- due to CKB was paid by the 2nd. defendant and he paid \$121,890.80 to HKB on 27.4.74. The 1st. defendant said later however it was he and not the 2nd. defendant who paid the \$92,000/- to CKB. He also paid the \$121,000/- to HKB. But both were on the direction of 2nd. defendant. He denied pressing P.W.(2) for the payment of the judgment obtained against P.W.(2) by the 2nd. defendant. He also denied that he did not press P.W.(2) to clear the overdrafts.

The 2nd. defendant reaffirmed what the 1st. defendant said. He denied all the allegations made by the plaintiff which incriminated him. He also repeated in essential terms as in the averment as to the circumstances in which the land became his and later was transferred to the 3rd. defendant. He said he imposed a caveat on the land on the April 2, 1975 but at no time did the plaintiff seek

A to remove it till the time the land was registered in his name. He said the caveat was to protect his interest because the certificate of title was returned to the bank. He added that the \$121,000/- paid by the 1st. defendant to HKB and the \$92,000/- was paid by the 1st. defendant on his direction. He
B borrowed from the 1st. defendant the \$220,000/- arising from a discussion he had with the 1st. defendant what to do with the property. The latter had told him to transfer it to the 3rd. defendant. He had the money to pay, but he had decided against developing it himself. It was his own decision. It was cumbersome to develop the land. The
C Sessions's Court action was taken to ask the plaintiff to vacate the land after notice was sent to her and not complied with. The letters written by him to CKB for the title deeds was not done as acting as solicitors for the plaintiff but because the deceased said there was a buyer for the land. He filed
D a writ against P.W.(2) in Singapore for \$149,000/-. P.W.(2) gave him the cheque for that amount which bounced. P.W.(2) told him to issue a writ against him so that with the judgment he could obtain money from the Moscow Bank. P.W.(2) told him if he was made a bankrupt, the Moscow
E Bank would assist him in granting the additional facilities. He did not however proceed with the judgment. He asked the deceased about the \$140,000/- which the Chung Khiaw Bank had asked him to pay in order to discharge the charges, but the deceased just smiled. The latter said he
F needed the money.

The 3rd. defendant testified that in July 1975 the 1st. defendant approached him to assist him to act as his trustee or nominee in respect of the land he was buying in Johore. He agreed. The 1st. defendant told him it was for sub-division and development. The latter already knew that he was a Malaysian citizen. He did not make further enquiries after so agreeing because he knew the 1st. defendant well and trusted him. He had no beneficial interest in the property. He never saw the property. He did not consider the 1st. defendant's request abnormal. He was told that the tenants refused to leave. He agreed to commence proceedings against them because it had to be in his name. He signed the memorandum of retainer for Suppiah & Singh. He attended the court hearing in Kuala Lumpur in connection with this suit where he saw the plaintiff. He did not attend the court proceedings at Johor Bahru in the eviction. He was never asked to attend. He said the record was incorrect which said he was in court on the May 12, 1976. Majid, Counsel for the plaintiff had confirmed this to him, and his Counsel. He was in Singapore on

that day but he did not know what he did. He checked with his Secretary's diary and confirmed that he was in Singapore. He was informed of the outcome of the proceedings in January 1977. He was a partner of Rodyk & Davidson in late 1976. There was at that time a serious partnership dispute in the firm of which Coomaraswamy P.W.(4) and S.K. Tan were on one side and apparently he and the others, the other side. He had a lunch on meeting with his group at his house on the January 15, 1977. He was told by a partner one Selvadurai that a senior partner, Coomaraswamy P.W.(4) had accused him of being involved in some scandalous land transaction in Johore Bahru. He was shocked. S.K. Tan and P.W.(4) did not see him personally about this. He denied it since he was the registered owner of the land in Johor Bahru and there was nothing scandalous. He said P.W. (4) had used the allegation to expel him from the partnership. To cut the long story short the little storm erupted over the admission of I imagine a beautiful lady Miss Murugesu who was P.W.(4)'s assistant. The 3rd. defendant had for reasons best known to him strenuously objected to her admission. It would appear from the bundle that Rodyk & Davidson broke up after sometime. I would imagine that love and jealousy had its little story to tell in bringing it to a close. He went and made enquiries from the 1st. and 2nd. defendants about the land. They told him the history of land and recounted the transaction. That was the first time he came to know. Two letters P.49 and D.6 were brought back by him after seeing the 1st. and 2nd. defendants and he gave them to his partners. There was subsequently an enquiry held of him by the firm and by the law society. He made a reference to the law society on the advice of his firm but before he could do that S.K. Tan and Coomarasamy had filed their complaint, contrary to agreement, first, Potts, one of the senior partners name was blotted out by S.K. Tan and Coomaraswamy. Potts was supposed to be in the complaint. (The complaint to the Law Society, the defendants reference to it, and the reply to the complaint were admitted (D 29A, D 29B, D 29C). He said that he had never at any time stated or asserted that he was a *bona-fide* purchaser of the land for value. It is a defence available to the owner of the property whose title is to be defeated. He did not see any of the documents that had been filed in court by Suppiah & Singh except the memorandum of retainer which he signed. He told the partners of his firm he was a trustee or nominee orally. He was asked by Potts one of the partners of his firm to make a representation to the Law Society Singapore regarding the episode but he did not set out in it or the reply to the complaint the fact that he

was a trustee or nominee, because it would fall into the hands of P.W.(4) and S.K. Tan the complainant. He presented the counter claim to the plaintiff's claim as trustee for the 1st. defendant.

Having set out the facts let us first deal with the question whether there was a contract between the plaintiff and the 2nd. defendant. In the memorandum P.30 and the manuscript P.31, the 2nd. defendant had undertaken not to sell the land within a year and to return it within a year of the repayment of the sums specified therein. There was consideration for that undertaking because only on it being given was the plaintiff prepared to sign the memorandum and the undated transfer. The undertaking had thereby become a promise. The defendant contended that the 1 year not to sell should date from the date of the execution of P.30. whereas the plaintiff says it should date from the time the defendant paid all the money as stated in it. The repayment can date from the 30th. provided payment had been made on that date. The defendant said the transaction was a sale with a right of re-purchase but even in a *jual janji* transaction which is alike, the payment must be simultaneous with the transfer, when the repayment shall begin, as only to be expected from the date of the payment. In my judgment, there can be only one construction to the manuscript, that is that given by the plaintiff otherwise it would mean that the defendant could forfeit the land before they had paid for it. That would be the height of ludicrousness. The defendant had not cited a single authority to support his proposition. The payment had thus not been paid within a year because the payment was made on the July 5, 1975 and the land was registered in the defendant's name on the July 22, 1975, barely 17 days later. The plaintiff also urged and I find there was a breach because the payment was not done in accordance with P.30 since the 2nd. defendant never paid the \$110,000/- to the 1st. defendant or the \$103,000/- to CKB. The 1st. defendant paid the \$120,000/- himself to HKB clearly because he had guaranteed P.W.(2) overdraft. The 2nd. defendant conceded the payments under P.30 should be made on the outside within 1 week. He had not done so because allegedly he or the 1st. defendant discovered that the payment due to the HKB was not \$110,000/- but \$120,000/-. But if as he admitted the discovery was a week after the event the relevance of the discovery could hardly be conceived especially since both the defendants said they could have before the 30th. itself or a week after enquired from the HKB the amount outstanding against P.W.(2). Besides, it is rather strange to hear that they would accept the deceas-

ed's word for what was due from P.W.(2) to the 1st. defendant. After all it was the 1st. defendant's guarantee and it was his guarantee and not the deceased that was at stake. What would the deceased know what was the state of the account between the 1st. defendant and the Bank. The Bank would not normally divulge the state of their client's account to others. The only other person who would know would, of course, be P.W.(2). Are the defendants therefore saying that instead of the 1st. defendant picking up the phone and ringing up the HKB on the very afternoon of the 30th March to enquire and getting the answer, no doubt then and there, he would get it through the deceased, who got it through P.W.(2) who the Defendant was loudly telling the court, by the manner in which P.W.(2) was evading payment, was not to be trusted? That is too tall a story for me to accept. Besides I cannot seriously imagine that anyone who is keenly anxious to discharge their bank's liability, particularly seeing what sort of person P.W.(2) was, would rely on others' information rather than checking on it himself. Where would they be if it was found later that the amount was wrong; they will have problem going against the deceased because he was not a party to the agreement. In my view, if the 2nd or 1st. defendant said they did not enquire it was simply because there was no point in finding out what they already knew, and they were plainly lying when they said they relied on the deceased for the information. If they knew, then how could the deceased have agreed to vary the agreement. To say therefore the 1st. defendant had allegedly discovered the variation only after signing of P.30 was hardly to be believed.

In any event what business had the 2nd. defendant not to pay the 1st. defendant the \$110,000/- and the CKB the \$103,000/- despite what happened afterwards? His contract was with the plaintiff not with the 1st. defendant or P.W.(2), especially since the 1st. defendant said he had no quarrel with P.W.(2) that he went up to \$120,000/-. If P.W.(2) had exceeded the \$110,000/- that was strictly a matter between P.W.(2) and the 1st. defendant, but there was no reason for the 2nd. defendant not to pay the 1st. defendant. Indeed one does not see how the 1st. defendant must imminently be concerned to pay HKB at all since there was no evidence that HKB was pressing P.W.(2) or the 1st. defendant to pay. Not a single letter from the Bank was produced for instance to show the Bank's extreme anxiety on the matter. To say therefore that after the supposed discovery the deceased had agreed with the 1st.

A defendant to vary the agreement and fundamentally alter his position to deny himself the benefit of P.30, is hardly believable because on the defendant's own evidence there was no cause for the deceased or the plaintiff to have expressly or impliedly agreed to do so. The 2nd. defendant nevertheless disregarding P.30 sued P.W.(2) for \$110,000/- in Singapore clearly in breach of it. The 1st. defendant said 2nd. defendant sued P.W.(2) in order to help him because that would enable P.W.(2) to get the necessary loan from his bank. But this is absurdly suggesting that Moscow Bank, without any security from P.W.(2) would help him merely because he was in trouble. Why would a Bank want to do that for? He said the judgment for the \$149,000/- was to be paid to the plaintiff but that would mean that he would be giving a gift to her, and he admitted this, since they said that would not alter the memorandum, because even if the money was paid to the defendant, she would not be able to get her land back. Why would P.W.(2) then being impecunious himself would wish to be so magnanimous?

E It would be necessary to consider the question of privity. It is clear from what has been stated, that the 2nd. defendant would be liable under the contract to the plaintiff. It is also clear that there is no privity of contract between the plaintiff and the 3rd. defendant. But was there a privity between the plaintiff and the 1st. defendant? In my view the answer is in the affirmative if a relationship of agent and principal existed between the 1st. and 2nd. defendants. Whether there was such a relationship could be inferred from the circumstances and the parties' conduct. If it could be inferred that the 1st. defendant was the undisclosed principal and the 2nd. defendant was his agent, then the latter may personally be held liable or alternatively, the former, as principal may be held liable, for the act of the latter as agent within the scope of his (2nd. defendant) expressed or implied authority. (*Cheshire & Fifoot* 6th. Edition Page 415). And the 1st. defendant as principal would be estopped from saying that the 2nd. defendant was not his nominee or agent. As Lord Cranworth in *Pole v. Leask*⁽¹⁾ said

I "No one can become the agent of another except by the will of that person. His will may be manifested in writing, or orally or simply by placing another in a situation in which according to the ordinary rules of law or perhaps it would be more correct to say, according to the ordinary usages of mankind the other is understood to represent and act for the person who has so placed him. This proposition is not at variance with the doctrine that where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent and knows

that that other person is about to act on that behalf, then, unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed."

(See also *Cheshire & Fifoot* at Page 402 – Agency by Estoppel).

Let us therefore examine the evidence. Under P.30 the 2nd. defendant was to pay \$110,000/- to the HKB and \$103,000/- to CKB. These sums, by the defendant's own admission, were never paid by the 2nd. defendant, but by the 1st. defendant according to him at his direction (2nd. defendant) because the land was bought by the 1st. defendant. This fact was confirmed by the 2nd. defendant. We also know that the 3rd. defendant was the nominee of the 1st. defendant, when the land was transferred to him. This fact was also admitted. In my view the 2nd. defendant was also the nominee and therefore agent of the 1st. defendant when P.30 and the transfer were transacted, as can be gathered from the circumstances. The 2nd. defendant said after he bought the land he saw the 1st. defendant and had discussion with him and asked him what he should do with it. The 1st. defendant told him to transfer it to the 3rd. defendant. He did not say it in so many words, but what he meant was he wanted the 1st. defendant to buy it and if the latter decided not to, then he would, he said, have to carry it himself. He had however the money to pay for the property but decided against developing it himself, because it was cumbersome. He had however borrowed from the 1st. defendant to pay for the land in the first place, in order to develop it, since the land had development potential, and make a profit. But he had nevertheless not looked into the cost of developing it or considered a scheme for development, nor had he ever inspected the land. Why then would a person who had money to pay unnecessarily borrow in the first place? He might have to incur interest on the loan. In fact he said he could have, if he wanted, paid the \$220,000/- on the 30th. And then why would a person suddenly decide to sell a land barely 3 weeks after he had supposedly bought it for the same price without making even one cent profit although he had clearly bought it he says to make a profit. Further, it is almost impossible to imagine that a lawyer was going to spend \$220,000/- buying a piece of land without even inspecting it, let alone if he was going to develop it. And who was going to spend that money without making even a rough estimate of the costs. Otherwise how did he arrive at the profit? If there was no costs, then there was no profit and there was clearly no

A point of buying in the first place. If he bought and sold it to the 1st. defendant because he did not want to develop it then why buy at all? These answers lead one to only one conclusion i.e. that the 2nd. defendant never bought the land in the first place but had done so on behalf of the 1st. defendant and for reasons I shall deal later when I deal with fraud, to keep the identity of the 1st. defendant undisclosed. As one can see also from the evidence and the pleading the defendant's story all along was that the 2nd. defendant bought the land and paid the \$220,000/- himself. The 1st. defendant paid the \$121,000/- to HKB also himself. And the 3rd. defendant said he bought the land from the 2nd. defendant. In fact at the Sessions Court on the eviction summons, the 2nd. defendant as Counsel also said the 3rd. defendant bought the land from him. But later the 3rd. defendant changed his story and amended his pleading where he said instead he was at all relevant times the nominee of the 1st. defendant as far as the land was concerned. The 1st. defendant asked him to keep the land for him (1st. defendant). Consequently, the 2nd. defendant had also to change his story to say that he did not sell to the 3rd. defendant but to the 1st. defendant. But if the property was not bought by the 3rd. defendant from the 2nd. defendant and the former did not pay for it and was transferred to 3rd. defendant not directly from the 1st. but through the 2nd., then it simply means that the 2nd. defendant had bought the property on the 1st. defendant's behalf as his nominee in the first place. Otherwise there was absolutely no reason why the 2nd. and 3rd. defendants should be lying and the sole purpose of that lying was clearly to hide the 1st. defendant. But since the 2nd. defendant had all along put up the story that he and not the 1st. defendant bought the property in the first place from the plaintiff, he now finds it awkward after the 3rd. defendant's aboutturn to change his story so he had to say that he bought and sold it to the 1st., but since it had already been said by the 1st. defendant that he paid the CKB and the HKB, the 2nd. defendant had to say now he borrowed initially from the 1st. defendant and the latter paid at his direction. I think this must be the necessary conclusion because if in fact the land had subsequently been sold to the 1st. defendant, it is strikingly odd that it had not been pleaded in the first place, nor the fact that the 1st. defendant had paid the HKB and the CKB at the 2nd. defendant's direction. A little logic is enough to disprove the 1st. defendant's claim. If he said he was liable to HKB on his guarantee then he would be paying the Bank whether the

2nd. defendant directs him or not. In the circumstances, the plaintiff is entitled to hold the 1st. or the 2nd. defendant liable. In any event since P.30 was entered into between the plaintiff and the 2nd. defendant, the latter could clearly be liable on the contract. The question of amendment might arise. But it has been stated that often the change of front has been anticipated and a postponement is not insisted on. In such cases it often happens that nothing is said about amendment and the case continues as though the issues which are being fought had been duly raised in the pleadings. (*Supreme Court Practice* 1973 Vol. (1) Para. 20/5 – 8/10). I do not think in this case there can be little doubt that the 1st. defendant knew that 2nd. defendant was his nominee as has been discussed, and therefore he would have anticipated that this point would be raised by Counsel if and when he was able, after the cross-examination, to extract it from the defendant's answers. The question of amendment would therefore have been quite redundant if not superfluous. I shall deal with the quantum of damages when I deal with the question of fraud.

It is time to deal next with the question of undue influence. A contract is said to be induced by undue influence where the relation between the parties is such that one of the parties is in a position to dominate the will of the other and to use that position to obtain an unfair advantage over the other (section 16(1) Contracts Act). One is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other or, where he stands in a fiduciary relation to the other. The relationship of solicitor and client is regarded in equity as a fiduciary relationship, and the rule of equity that a transaction *inter vivos* is presumed to have been procured by undue influence until the contrary is shown applies to transactions between a solicitor and his client and accordingly the question in each case is not merely whether the client understood but rather how his intention was procured. (*Halsbury's* 3rd Ed. Vol. 26 Para. 118). Section 16(3)(a) of the Contracts Act says that where a person in a position to dominate the will of another, enters into a contract with him and the transaction appears on the face of it or on the evidence adduced to be unconscionable the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. Was there undue influence exercised on the plaintiff? This question has two aspects to it. First, whether the defendant was retained by the plaintiff at

A the relevant time as his solicitors, in which case undue influence would be presumed from their relationship. The other is where there is no such relationship but nevertheless undue influence is presumed.

B It is settled law that the authority of a solicitor to act is constituted by his retainer but the court may imply the existence of a retainer from the acts of the parties in the particular case (*Halsbury's Laws of England* 3rd. Ed. Vol. 26 Page 61). The retainer is necessarily confined to transacting business which the retainer extends or impliedly extends.
C Contrary to the defendant's contention, whether a solicitor is paid fees or not is thus not essentially the test of a retainer because obviously a lawyer who acquires from his client may not want to charge fees because an unholy deal may more than compensate for the fees. Was the defendant therefore the plaintiff's solicitors at the material time? On the 12th. March, 1974 the defendant wrote to CKB in P.27. (Full text given earlier), and the reply is in P.28 which reads as follows:

"P.28

E

CHUNG KHIAW BANK

A.R. REGISTERED

F Suppiah & Singh
Advocates & Solicitors
2-D Jalan Ah Fook
Johore Bahru.

(134)F IC/74 SU 12-3-74 AC 146 14/3/74

G Subject: Mr. K.V. Devan – C/A 146 – Legal Charge
on C.T. 13817 Lot 6025 Mukim of Senai Kulai
in the name of Mdm. Tara Rajaratnam

Dear Sirs

H With reference to your letter of March 12, 1974 we are to advise that the balance of subject account with us as at 8.3.74 was \$103,658.44 (Dr.) with interest @ 11.5% per annum. The above title deed and duplicate charges are enclosed for your preparing of discharge of charge.

Please acknowledge receipt of this letter and the enclosures.

Yours faithfully

I

For CHUNG KHIAW
KULAI BRANCH

Sgd.
Officer-in-Charge

Encl."

I think the letter P.27 speaks for itself that the defendant in saying that "We act for Madam Tara, our client wishes to pay off the charge" and "On our usual understanding" that the defendants were in lucid terms acting for the plaintiff when P.27 was written. But if the letter says the defendants were acting for the plaintiff for the purpose of getting an increased loan, then it must follow they were also acting for the plaintiff when the land was transferred to them for the purpose of getting a loan. In both the situations it was for the purpose of getting a loan to discharge P.W.(2)'s debt to the HKB. This was all more so, since in the latter case, the defendants were transferring the land to them and they had not advised the plaintiff to engage another Counsel to act for them and they were told by the deceased to prepare the necessary documents to give effect to their arrangement to transfer the land. The defendant said they were merely acting as solicitors to assist the plaintiff when they wrote P.27 and were solicitors assisting the plaintiff when they received the reply P.28, but were nevertheless not the plaintiff's solicitors, as if stating that as solicitors, they were not supposed to assist. But what are solicitors for then, supposedly getting fees for not assisting? I wonder. I think this deplorable display at quibbling to say the least, is enough to show whether the defendants were acting for the plaintiff at the material time. But once a person is expressly or impliedly retained as a solicitor, which the defendants by the circumstances clearly were, then, it follows it cannot alter their position as solicitors that they assist or does not assist the client, although it cannot be seen how when acting as such, a solicitor can escape from assisting one's client, in some form or another. But once a person acts as a solicitor then the presumption of undue influence arises, and unless they can rebut it the property they acquired from their client cannot be allowed to remain in their hands. Acting as a solicitor intrinsically creates a fiduciary relationship between a solicitor and his client which the solicitor cannot take advantage of since it imposes an obligation on its part to act with strict-fairness and openness towards them. (*Halsbury's* Vol. 26 Para. 131). But a person need not be having fiduciary relationship with another for undue influence to arise if the relation between the parties are such that one of the parties is in a position to dominate the will of the other (section 16(2) Contracts Act). I shall deal with the question of whether Yeow & Chin were at relevant times acting for the plaintiff when I deal with the question of fraud.

The evidence led showed that the plaintiff had been asked to sign P.30, 31 in circumstances, if

A not in terms clearly unfavourable to her when between her, a lay person and the defendants, very senior lawyers and State Dato', position of respect and dignity in the State, they were clearly in a position to dominate her will to their advantage. The defendants must be well aware of the fact that in the position thus held by them they were in fact holding out to the plaintiff, that they were men of trust and confidence and of the utmost honesty and integrity and therefore she would have tended to accept without much ado what they represented to her. And bearing in mind, that P.30 and 31 were construed by the defendants in a manner clearly favourable to them and unfavourable to her, that in the circumstances, they should have refused to proceed without her getting the benefit of independent advice. And yet she had not been so advised when in a position held by them there was a conflict between their interest (as they alleged) as buyer, and their interest as solicitor. Thus, the memorandum did not state when the consideration was to be paid and yet they did not explain to her, they (the defendants) as they alleged, could pay anytime they liked. It seemed to me that any solicitor would have insisted on a date of payment to be inserted especially since despite their idea of a reasonable period of payment to be one week at the outside, the term had never been complied with.

F The defendant had sought to nullify the effect of their dominance on the plaintiff by suggesting that the manuscript P.31 was inserted in the memorandum at the plaintiff's own request. But if she had said so clearly it was only because she said, the memorandum the defendants had prepared did not satisfy her that it was a security, and she had therefore expressed her dissatisfaction of it. G But the precise terms of that security was certainly not her own making, since it was dictated word for word by the 2nd. defendant himself to his friend, D.W.4. If the defendants are going to construe that manuscript at this instant in a manner other than H that of security which would safely protect her interest, she certainly cannot be blamed for it now especially since the manuscript was never explained to her. The terms of P.30, the 2nd. defendant says was supposed to have been fundamentally varied by the deceased because of what the defendant termed as the "subsequent events" that took place. I But the agreement P.30 was entered into with the plaintiff and yet she herself was never informed of this supposed variation by the defendant although it clearly had greatly prejudiced her. One would have thought that if they were acting in the best interest of the plaintiff that the defendants would have had the variation reduced into writing as a

supplementary agreement, as any lawyer, would, I imagine have done. It was said by them that the husband was entitled to vary the agreement made by the wife orally, depending on the circumstances but there was no authority cited or the circumstances given for such justification and yet the defendants said it was not prudent to have the varied agreement reduced into writing. They said that despite the manuscript P.31., P.30 was supposed to be an out and out transfer and P.31 was not a clog on their dealing with the land (Page 200). In view of this seemingly very conflicting interpretations, I thought, it was only fair that the terms and implications were fully explained to her but were not. If explained in all probability the plaintiff would not have agreed to enter into the transaction in the first place. May be that was the reason why it was not done, at all. Again under the terms of P.30 according to the defendant, the plaintiff had to vacate the land even before they (the defendants) had paid the full consideration of \$220,000/-. Even if that was correct, it must have been at least explained to her and she must be given the opportunity to say whether she still wished to proceed with the transfer. I do not think there can be any doubt that the terms do appear to be manifestly harsh and unconscionable to say the least, which would only justify asking her to engage Counsel, to vouch the reasonableness of the terms she had to sign. It is not, of course in every Case that independent advice is necessary, provided that it is shown that the transaction was manifestly fair to the client. (Vaughan Williams L.J. in *Wright v. Carter*⁽²⁾). But I have no doubt that from the evidence, that the transaction P.30 in the way it was construed by the defendant was highly unfair to the plaintiff. It was submitted by the defendant that no action could lie against them because the security was not in proper form citing *Haji Abdul Rahman v. Mahomed Hassan*⁽³⁾. But if the defendant knew that the manuscript was of no effect and unenforceable it was for them to have the security done in proper form. If they conveniently kept silent and nevertheless allowed the title to pass, they should not be estopped from being found to have committed fraud. That would not be Equity itself. Their fraudulent act would only justify a court of equity to enforce the terms as a contractual liability.

As earlier stated, the burden of proving that the contract was not induced by undue influence was on the person in a position to dominate the will of the other that is the 1st. and 2nd. defendants. It is clear from what has been said they

A had not discharged that burden. Indeed what they said was an admission of their failure to discharge that burden.

B Under section 20 of the Contracts Act, any consent to a contract entered into under undue influence is voidable at the option of the party whose consent was so caused but plaintiff must return whatever benefit he has received from the defendant under the contract. It has been urged that the contract being voidable, it is for the plaintiff to set it aside by repudiating the contract, failing which she must be deemed to have affirmed it, and at no time has the plaintiff given notice to the defendant to do so. But the rules seems clear that he need not do so since the writ itself is sufficient act of repudiation. (*Halsbury* Para. 1600).

D Let us proceed with the claim for the breach of trust. A person acting as solicitor is not necessarily a trustee in relation to his clients but special circumstances, as where money is paid by the client to his solicitor for a particular purpose may constitute the solicitor as trustee of that money in relation to the client. (*Halsbury* Vol. 36 Para 85). It seems clear where the 1st. and 2nd. defendants as solicitors had been entrusted by the plaintiff with the holding of the document of transfer as a security, they were by virtue of the above principle constructive trustees of that property and if they had used it to transfer it to the one with the concurrence or condonation of the other, then both of them must necessarily have committed a breach of trust. In every case where the person in whom real or personal property is vested at law has not the whole equitable interest therein, he is trustee *pro tanto* of that property for the persons having such equitable interest (*Underhill on Trusts* 11th. Ed. P.210). It is clear therefore that by virtue of the above principle that where the 1st. and 2nd. defendants as solicitors had been entrusted by the plaintiff with the holding of the document of transfer as a security, or until such time as there had been proper compliance with P.30. they were, since only the equitable interest was with them, a constructive trustees at least of that property and if they had used it instead to transfer the land to themselves, they had committed a breach of trust. But whether in fact the transaction is a security or not, is a matter which will be discussed later in conjunction with the allegation of fraud. The 3rd. defendant however, not being in a fiduciary relationship with the plaintiff could not be guilty of undue influence.

Let us lastly deal with the question of fraud. But first, it is essential to know what fraud means. The fraud which is being alleged arises from the transfer of the land from the plaintiff as the registered proprietor to the 2nd. defendant and subsequently from the 2nd. defendant to the 3rd. defendant. The plaintiff is asking the court to declare, among other things that the transfers to the defendant were fraudulent and null and void. It inevitably therefore brings into play the operation of section 340 of the National Land Code because in order to claim damages which is one of the remedies sought, it is only implicit that she must first be able to set aside the land in the hands of the defendant if it had not been transferred to 3rd. parties. I say this because a contrary view would only mean that the plaintiff can absurdly obtain damages although she would not be able to recover the land in the first place. As far as the 3rd. defendant was concerned it must be shown that he was at the material time a *bona fide* purchaser for value from the 2nd. defendant. For ease of reference section 340 of the National Land Code is reproduced. It states:—

“Registration to confer indefeasible title or interest, except in certain circumstance.

340. (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.”

It is clear therefore that fraud is one of the instances when a title can be set aside or defeated. But as one can see sub-section (2)(a) talks of fraud or misrepresentation. In other words one or the other ingredient need only be proved to defeat a title. Judicial thoughts seem to be of the same

view. (*David Wong* on Tenure and Land dealings in the Malay States, and *Judith Sihombing* on National Land Code). There must be actual fraud which is dishonesty of some sort not constructive or equitable fraud (Lord Lindley in *Assets Co. Ltd. v. Mere Roihi*⁽⁴⁾) or some moral turpitude (Griffith C.J. in *Butler v. Fairclough*⁽⁵⁾). His Lordship had not incidentally in that case propounded what dishonesty meant. There is no known definition of dishonesty in civil liability. In criminal law to act dishonestly is to do anything with the *intention* of causing wrongful gain to one person or wrongful loss to another (Section 24 Penal Code). Since the standard of proof of a criminal act is higher, it can safely be said that proof of the latter would safely satisfy proof of the other. Chambers dictionary says “dishonest” means wanting integrity, disposed to cheat, insincere, unchaste. Section 17 of the Contracts Act says:

“17. “Fraud” includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge of belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive;

(e) any such act or omission as the law specially declares to be fraudulent.

Explanation — Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, equivalent to speech.”

It would follow therefore that in committing any of the acts or omission in paras. (a—e) above of fraud an act of dishonesty defined earlier would clearly because of its wider ambit also have been committed although the reverse may not necessarily be true. One would note that section 340 only refers to misrepresentation; it does not say whether it is innocent or fraudulent misrepresentation. *Snell* on Equity (2nd. Edition, Page 493) defines fraudulent misrepresentation as a false statement of fact made knowingly by the representor or without belief in its truth or recklessly without caring whether it is true or false, with intent that it should be acted upon and which is in fact acted upon by the representee. Since there need first be an innocent misrepresentation before a fraudulent situation

could arise it would follow that once the latter is proved, the former must necessarily be presumed. It has also been decided that fraud must be proved beyond reasonable doubt. (*Saminathan v. Pappa*⁽⁶⁾). A representation is a statement of present or past fact. Therefore a statement of intention is not a representation of fact because it relates to the future. But a statement of intention also involves a representation as the existence of the intention which is itself a present fact. Thus the non-fulfilment of the intention, may be some evidence strong or weak, according to the circumstances of the individual case that the intention never existed at all. (*Halsbury's* Vol. 26 Para 1517). This is in effect stated in section 17(c) of the Act above.

Let us look at the evidence. According to the plaintiff she learnt before the March 30, 1974 that P.W.(2) her brother-in-law was indebted to the HKB. She also learnt that the 1st. defendant had to pay the HKB \$110,000/-; that the 2nd. defendant had to pay the 1st. defendant the sum of \$110,000/-. She also knew before the 30th. that she was to put up the land for a security for the two sums mentioned in P.30.

I think there can be no question from the facts above that when she signed P.30 and the transfer forms which were undated (not disputed), the plaintiff was under the impression that the land was transferred to the defendant as a security for the purpose of securing P.W.(2)'s debt to HKB vis-a-vis the 1st. defendant, reinforced by the assurance given by the defendants that although it was a transfer the security was by way of a transfer; that P.W.(2) would pay back the money and she would get back her land, and if he could not do so, the land would be sold and the debt paid and the balance be used to buy some property nearby, coupled with the assurance given in P.31 that the land would not be sold within one year and that she would be able to recover it within a year when she paid the \$220,000/-; that she would be able to get her land even after the year was over.

The plaintiff had impressed me as a witness of truth. If there were discrepancies in her evidence, these were only to be expected, if human frailties are what they are. She was in court for the better part of almost 5 days and subject to cross-examinations by three senior lawyers. She was not a lawyer herself. And yet her case quite definitely had involved the use of a multitude of documents and the effect which the court was to give effect to them. These documents strictly speaking should,

A as a registered proprietor, have been served on her but except for P.27 and P.67 none were served on her by the defendants, and nevertheless these documents were sought to be used against her although nowhere was it established that she had agreed to waive her right to be served. But it seems to me that the way the questions were put to her as if she had been served and what was more to answer them as if her reaction to them would be that of a lawyer. I have no doubt that the reason they did not see fit to serve her, except in P.27 when they wanted her title deeds and in P.67 when they wanted to evict her out of her land, was because, considering her somewhat explosive reaction in regard to P.30 and 31, they had to avoid her altogether so that there could be no stumbling block to their mischief, and not because the deceased told them the land was his. I had also to bear in mind that the defendants at the time when the transfer was effected were not only lawyers but people of high social standing. It was natural to expect that generally being solicitors and State dignitaries, that whatever they did others would expect they would have done them in the best interest of those whom they deal with. Under those circumstances one's reaction in life may sometime appear to the contradictory when in fact they result from being unsuspectingly led by the complete trust which one places in others and thus being the victim of one's own circumstances rather than otherwise the case. I had no cause to disbelieve her that the transfer of the property to the defendant was as a security for a loan to help P.W.(2), her brother-in-law, nor to suspect why she would want to lie against the defendants. I believe in the final analysis she might have believed that the transaction on the 30th. was because the 2nd. defendant told her that the security was in the form of a transfer, only *in form* a sale and made to believe so, but *in substance* she knew and believed in her heart that it was a security. The defendant said the plaintiff wanted to sell the land because P.W.(2) was in a financial difficulty, but that could hardly be a compelling reason for her to sell especially since the defendant never in the first place said that they were not prepared to assist P.W.(2) if she was not prepared to sell the land. Indeed on the contrary the evidence all along by the defendants (which the plaintiff deny) was that it was the deceased and the plaintiff who offered to sell. Besides, the 1st. defendant said he had no quarrel with P.W.(2) that he went up to the limit of \$120,000/-; he should know. If he had been pressed by the bank, he would have hastened to produce letters or documents to highlight the bank's anxiety. On the other hand I cannot honest-

ly imagine that a housewife would sell her land and rent a house and stay out if necessary just to help a brother-in-law as if her brother-in-law's life was more precious than her's and her own children. It is just not true to life. Unless of course, if she was financially indebted to P.W.(2) or the latter had an interest in the land. Or, unless she was such a wealthy lady that she could well afford to give away her property, at the slightest suggestion of it. But if she was, I do not see why she had to get a loan at all in the first place. If in fact she had made an outright sale to the 2nd. defendant, then it may be wondered why it was necessary for the manuscript to mention that the defendant was not to sell to *anyone* within one year suggesting that it had not been finally sold to the defendant. And why the manuscript itself made no mention of a sale to the defendant. The manuscript itself seeks to restrict the defendant's right to sell the land which is a direct opposite to an outright sale and to absolute ownership. It seems to me to be rather strange that if in fact the land had been sold to the defendant outright that it had not been so expressly and specifically stated in the memorandum. After all, the defendants were very senior lawyers; with their years of experience and skill, they certainly could not be heard to say that they were incapable of giving effect to their true intention and meaning. But there was no reference in P.30 and 31 to "selling" or "purchasing", or "vendor" or "purchaser" as would necessarily suggest that it was an outright sale transaction. But whatever the defendants had in mind, I do not think there could be any doubt, that because of the manuscript the defendant knew the plaintiff and the deceased intended the transaction to be a security. The plaintiff said she had in another previous occasion transferred her land to one H.L. Tan and was retransferred to her, also for a loan. H.L. Tan was not available as a witness as he was not in the country at the date of the trial. But I do not think even without his evidence it would affect the credibility and merit of the plaintiff's case in any way. In any event it cannot be denied that the respective transfers were made by the deceased to H.L. Tan (D.17) and one from H.L. Tan to the plaintiff - (D.16). The defendant said the sale was an outright sale which had effect as a complete and final transfer (Page 199). with an option to purchase. But then it was hardly possible for there to be an option to purchase at the same time as an outright sale because one is a form of security, the other is not. It simply does not make sense; One must cancel the other out, because they were in direct conflict. But the defendants, were understandably, in a dilemma. They had perforce to say that P.30

A was an out and out transfer otherwise, they might be questioned why, if it was not, they had nevertheless effected a transfer under Form 14A of the National Land Code which is the form for an out and out transfer. On the other hand, if they maintained it was not an out and out transfer then they would be at a loss to explain the existence of the manuscript which by their own admission fetters, their right "as owner to sell, within one year." (Pg. 200). So the best thing they could do, rather dismally I thought, under those awkward circumstances, was to attempt to mix some diabolical concoction and say that both transactions could be created at the same time. But quite obviously in trying to juggle it, the drink took toll of its own master. Because, if the transaction was to their knowledge an outright sale and intended it to be so, which was by their own admission an out and out transfer, then they had, by the manuscript P.31, fraudulently misrepresented it to the plaintiff that it was a transfer with a right to retransfer which was a form of security by reason of which she agreed and was induced to sign the undated transfer, an act of self-execution *de grace* on their part. We remember also that at a later stage the defendant filed a caveat after the plaintiff sought to make a 4th. Charge on the land. Thus there could not have been a sale, because if there was in fact one we would have expected the defendant to have filed their caveat in April 1974, soon after the transfer, to protect their interest but as we know it, they only did so on the February 2nd, 1975 because that was the first time they came to know about the 4th. Charge (Page 209), and clearly they caveated it to prevent the plaintiff from creating further charges. They said that they did so in order to protect their interest, because by that time they had returned the title deeds to the Bank, but it does not seem to me to make any difference even if the title deeds were with them, because unless they caveat it, no one would be prevented from dealing with the land. In any case, what interest were they going to protect? All along, they have not said one word about the plaintiff committing any fraud, or acting in an improper manner. In fact, it was just the other way round. What were they afraid of? To me there is no other explanation for their conduct except that the caveat was imposed because the plaintiff's 4th. Charge was in the way of their plan to make the deceased reduce the overdraft, which they felt must be stopped if they were to succeed, in their adventure. How could the defendant say that in P.30 there was a sale and transfer when he contradicted himself in his own sworn testimony in support of his application for a caveat that in P.30

the plaintiff had agreed she "would" transfer the land to him. That suggests there was no transfer and no sale yet.

I think the most atrocious act of fraud on the part of the defendants, if they had ever intended the manuscript to have any effect at all, was in not disclosing to the plaintiff, which I think any person, let alone a lawyer in his right frame of mind would have done, as they had made it known before this court, that the date of the one year when the repayment should take effect was not from the date the \$220,000/- was paid by the defendant but from the 30th. March itself, which clearly had the effect of defeating the very purpose for which the transfer was made in the first place which was essentially to use the money from the deal to overcome P.W.(2)'s financial problem with the Bank. If the money cannot be had despite the fact that the land had been transferred to the defendant since the plaintiff has to repay even before she gets her money, then there was no point in the transfer to be made in the first place. The effect was clearly thus that the defendant got the land, paid it in anyway they liked, the plaintiff was left without a roof on her head, P.W.(2) was, still in the *status quo* position of not having his debt cleared, leaving the defendant in the reversed position of being solely the beneficiary of the whole episode. That must be very nice and wholesome from the defendant's point of view, but considering how disastrous that would be on the plaintiff, she certainly, I reckon, would have the right to be so informed, as to have the choice of retracting her somewhat injudicious step. But I suppose, the defendant did not want the plaintiff to retract her step, otherwise I do not see why they had not felt it necessary to let her know what was in their mind, other than merely saying it was not necessary to explain.

The defendant was also guilty of fraudulent misrepresentation, if not of fraud, when they represented to the plaintiff that if P.W.(2) was unable to pay the debt, the land would be sold and the balance could be used to buy some property nearby, an assurance which I feel sure any housewife in her proper state of mind would have insisted upon under those circumstances, but which representations defendants knew to be false since it never existed because the opportunity was never given to her, and since they maintained it was an outright sale, they could not have intended to give her that opportunity.

They had also been guilty of fraudulent misrepresentation because although they represented

A that the transfer to them was subject to paying in accordance with the terms as stated in the memorandum P.30 and the manuscript P.31, not for one moment had they ever complied with the terms and, as will be seen shortly, the reasons they gave for not complying only goes to substantiate the non-existence of that intention. In the first place how could the defendant ever say that they had every intention of fulfilling the terms of P.30 and P.31, when before the plaintiff knew it the 2nd. defendant had filed a suit against P.W.(2) for \$149,000/-, which 1st. defendant said included the \$110,000/- in P.30, when the latter was agreed upon essentially to pay off P.W.(2)'s debt (Pg. 171). The suit had really extinguished P.30 and yet the land had already been transferred to the defendant. In fact it was evident that P.30, 31 were only used as the dangling carrot, a false device to induce the plaintiff to sign the undated transfer so as to enable them to effect the transfer of the land to them, eventually. The defendants could not have had any intention of enforcing the manuscript because even before they came to see the plaintiff on the 30th. March at her house, they had already prepared the memorandum P.30 and the undated transfer which looking at its format would have completely and finally transferred the property to them. The manuscript P.31 on the other hand would have completely repudiated that status from one of absolute owner to that of a mortgage. It would have drastically changed their original intention allegedly to buy, (so they say.). How could they ever have complied with the manuscript. If therefore there was already an unequivocal complete and unconditional sale they could hardly have given effect to the outright sale without in other words ignoring the manuscript altogether. If the manuscript was inserted nevertheless, it plainly means that it was just for the sake of satisfying the plaintiff's whim and fancy but was never intended by them to have any effect, because a lawyer in the normal course would have in the circumstances prepared a mortgage or charge in proper form. The defendants said that it was a *jual janji* transaction but if it was, it is rather surprising that it did not carry with it at least, the right to some beneficial interest, otherwise what benefit does it accrue to the mortgagee. But none of these minimum rights form part of the manuscript. The only way I can see why they had been omitted is because the defendants had given no thought to it at all since they had no intention whatsoever of giving effect to the manuscript. The fact that they had willy-nilly accepted the plaintiff's suggestion at the spur of the moment to include P.31 with evidently no question asked

although clearly this would, to their knowledge, instantly nullify the outright sale, merely point to their absence of that intention, because since they knew they were of no effect, it makes no difference whether it was part of the transaction or not. The transfer being left undated from the outset is also evidence of their intention to pay in accordance with those terms, because there was no need for the transfer to be made first and the payment to be made later, when both could be done at the same time. The defendant said this was necessary because the Charge had not been discharged yet. But this was obviously a deliberate falsehood designed to cover up their evil act because the defendants themselves had presented the transfer and the discharge to the land office for registration at the same time after they had paid the CKB (Page 186). It merely exposes the defendants' lie why they had effected an undated transfer to themselves. The defendants had plainly shown they had never intended to give effect to P.31 because in their submission they said that P.31 was a *jual janji* transaction which by the principle laid down in *Haji Abdul Rahman v. Mohamed Hassan* could not in any event be given effect to. But by accepting the terms of P.31 they were also acknowledging and representing to the plaintiff that it was a security, but the form of which they categorically knew to be unenforceable, but they were nevertheless bound to accept. They could even on March 30 had withdrawn the memorandum and the manuscript and advised the plaintiff to execute a proper form of security, but which they refrained from, but chose instead to mislead her. They could hardly plead now the illegality of the security. They are from their own fraudulent conduct estopped from invoking the plea. The reason the defendant gave for not paying the \$220,000/- and thus not complying with the terms of P.30 and 31 was dealt with briefly by me in reference to the defendant's contractual liability. These facts have bearing also on the defendant's liability in fraud. We will recall the 2nd. defendant said he had not paid the sums specified in P.30 because he discovered a week after the event that the amount owed by P.W.(2) at HKB was in fact more than \$110,000/-. But he also conceded that since no time was specified as to payment that he should ordinarily pay at the outside within a week of March 30. He was naturally asked of the relevance of the subsequent event (Page 201). His reply was "It is relevant. One of the many subsequent events was the overdrafts of P.W.(2) with the HKB was \$121,000/-". But it does not answer the question. If he knew he was required to pay within a week at the outside but

A did not pay nevertheless, then it plainly means he had deliberately avoided paying, and had no intention of paying in the first place. They said they could have easily asked HKB on the 1st. April if they wanted to, but instead relied on the deceased's information which as mentioned earlier could hardly be true.

B The 2nd. defendant said after the discovery he saw the deceased and the latter told him to tell the 1st. defendant to pay whatever was due to the HKB and the adjustments could be accounted for later. The deceased told him also that as far as his liability to CKB was concerned, he wanted to continue to keep the account at the bank opened for about a year. He also said if he had any buyer he wanted to transfer the land direct to him and in the meantime to stay on the property for which he would pay compensation. It will be recalled he said that sometime before the one year from the 30th. March was out, he saw the deceased and the latter told him that he could not get any buyers and he could not buy it, but nevertheless he wished to keep his account open till the end of June 1975 but would like to stay in the house till the end of 1975 and pay compensation for it and when he did so close his account, he would bring his debt down to \$92,000/- and the compensation was agreed at \$6,180/-. Quite obviously as will be seen shortly, all these assertions were without any basis whatever and were completely untrue, because as gathered from the evidence, the plaintiff herself knew nothing about these assertions because if in fact they were true the defendants would have told her and contacted her as they had done in P.30 and 31 when they executed the transfer of the land to them. They had for reasons only known to them allegedly only dealt with the deceased although it was never shown by them that she had ever authorised the deceased to represent her. I suppose the defendants are urging the court to say that the husband must always be assumed to be the attorney of the wife's property. That, I submit, would end us up in husbands marrying rich wives and cheating them of their property with the connivance and condonation of their solicitors. If this is what happened, which I have not the slightest doubt the plaintiff will deny, the defendants cannot say they are exculpated. It only makes their fraud even more damnable, and on this ground alone I think the defendant's story must be rejected and judgment be entered for the plaintiff. Be that as it may, let us follow the defendant's line of story. In the first place, if there was such a discovery and variation of the agreement, it is difficult to believe that the de-

ceased was not able to pay the difference in the amount which was only about \$11,000/- if the deceased was able to borrow from his friend Anandan (P.W.10) \$40,000/- to pay the same debt. In the second place if it is true that there was such a discovery and a subsequent variation that it was very odd indeed and very much unlike the conduct consistent with honesty let, alone that of a lawyer, that he had not reverted to the plaintiff to draw up a supplementary agreement or even for that matter, a fresh agreement to incorporate the new term. If the defendant had considered that in law her consent was required to draw up P.30, because they said she was the registered proprietor, I cannot see why in law, her consent was also not required to vary it. The defendants' reason was, it can be varied by the husband in certain circumstances. But he had not given the court the benefit of knowing such circumstances. In fact it is not known when legally that could be done in the absence of any evidence that the plaintiff herself was actually aware of the fact and circumstances and had orally agreed to the varied terms as alleged. Even in such a case, to protect their position, lawyers would normally follow it with a letter confirming the oral agreement or arrangement as would show the consistency. There was however no such letter. The defendants had been sending a number of letters to CKB telling them about why they were holding back the title deeds, but not one word was said to the Bank about the supposed new agreement, to show their *bona fide* and to put the Bank at ease by giving them the right picture.

It was suggested that the deceased could act on his own without getting his wife's consent because the deceased told the 2nd. defendant the land was his but was in his wife's name. But if this was true then it was surprisingly pointed out that the land was not in the deceased's name. There was nothing to show that the deceased was subject to any restriction as to owning property, and to put it in his own name. In fact the property earlier (and this was not denied by the defendant) was in the deceased's name before it was transferred to H.L. Tan and subsequently re-transferred into the plaintiff's name. If the property was the deceased's, then anyone would expect that on the retransfer it would be restored to the deceased; on the contrary it was re-transferred to the plaintiff. This was very unlike a property which was said to be the deceased's but in his wife's name.

It seems to me to be rather strange also that the defendant did not confirm with the plaintiff herself whether it was true in fact that the proper-

A ty was the deceased's, and that he could act as he pleased, in which case we would expect that they would advise her, if only in order to protect their own interest, to confer a power of attorney on the deceased. Or, the deceased himself, should be asked to produce a power of attorney or authority from the plaintiff to the effect that the deceased was the beneficial owner and that he was empowered to deal with the land. The defendant must explain why these steps were not taken which I think were the least to be expected from lawyers acting honestly especially since the defendants themselves had felt it necessary to caveat the land at some stage or another in order they said to protect their interest. Because it seems rather inconceivable to me that any right thinking lawyer would seriously embark to purchase a land, let alone for himself, from another without first ascertaining from the registered proprietor whether the person had the authority to act on her behalf knowing he might find himself later after sitting pretty on it served with a nice writ for eviction or damages by the registered proprietor as the 3rd. defendant himself, as the supposed registered proprietor, has effected on the plaintiff in this case.

E There was no reason for the plaintiff to lie that the land was hers as well as the husband's but it was put in her name because she said she had furnished the greater part of the purchase price. The defendant could not find her at fault in the manner in which she had acquired the means to repurchase the land. She said that she sold her jewellerys and she borrowed from her sisters for the means to repurchase. I think I may be justified in saying that our housewives are no more contented nowadays with depending solely on their husbands for all and sundries, especially if she has children to look after. It may be a matter of self pride or a question of necessity; but it is no more unlike them to acquire property of their own on their own initiative or saving. Next, the deceased had purportedly said that he wished to keep his account open at the CKB after he was told of the variance. But this assertion is so absurd as it is inconceivable because what cause has the plaintiff or Devan to do so, if as the defendant said the 1st. defendant nevertheless was willing to pay the difference between the amount in P.30 and the amount they said was found at HKB and the 1st. defendant had not minded P.W.(2) exceeding the limit of \$120,000/-, and she had not committed a breach of contract nor was alleged to have committed one. But nevertheless we are told that on keeping her account open the plaintiff had to incur additional interest liability at the Bank which at one time was to the tune of \$30,000/- or more, at the rate of \$30/- or

\$40/- per day up to \$1,000/- per month and she had also agreed to pay compensation to stay on her land. She had to bear all this great financial burden according to the defendants because the deceased was looking for buyers, despite the fact that according to them they had bought the land. Surely, the plaintiff was not going to be so naive and indifferent that she would not turn to the defendants and say to the effect, "You have bought the land, it's your duty to pay the interest." In fact, it is also very odd besides to hear the defendants saying that the reason why they told the Bank they were about to discharge the charge was because the deceased told them there were buyers, when at the same time the deceased was seen creating an additional charge to secure his debt. That was very contradictory in terms, so contradictory that the idea of the buyer could not possibly exist. If there was a buyer why must she create a further charge? In fact it is very peculiar indeed that the defendant should have allowed the plaintiff to charge the property at all, since it had ceased to be hers. The defendant said that was the arrangement. But how could there be such an arrangement, when he did not even know that the plaintiff was going to create the 4th. Charge in the first place since he admitted that was the first time he had sight of P.81, 82, 83 i.e. in court which mention about creating the 4th. Charge and the first time he knew about the 4th. Charge was, he agreed, in February 1975. And although he denies it, it was clearly because he filed his caveat on that date (Page 209). He said the deceased told him there were buyers when there was not a single piece of evidence to support that fact and yet letters were written by the Bank for a period of 6 months asking the defendant when to pay up and discharge the charge. Anyone in the defendant's shoes would have written to the Bank to say that a buyer was forthcoming because the deceased told them so. But none of the letters gave the slightest indication that there was a buyer. All they said was "We are in the process of discharging the charge" although according to them whenever they wrote to the Bank saying "We are preparing the discharge" it was because the deceased had indicated he had buyers - (Page 207). But suddenly P.43 the letter to the Bank from them emerged, and the defendants now told the whole world there was a buyer and the person happened to be they themselves. P.43 is of great importance. It says as follows:-

"SUPPIAH & SINGH TEL: 2254 No. 20, Jalan Ah Fook
Johore Bahru,
West Malaysia.

2nd. February, 1975.

M/s Chung Khiaw Bank Ltd.,
No. 4, Kulai Besar,
Kulai,
Johor.

Dear Sirs,

Re: Mr. K.V. Devan - Legal Charge on CT 13817 Lot 6025 Mukim of Senai-Kulai in the name of Mdm. Tara Rajaratnam (f).

We act for Mr. Suppiah to whom the owner of the above land Tara Rajaratnam had sold the property subject to the three charges namely:- Presentation No. 3060/67, Charge BK.126 Folio 72 (2) Presentation No. 4686/67 Charge Bk. 127 Folio 89 and (3) Presentation No. 5731/72 Charge Bk. 10 Folio 97 made by the said Tara Rajaratnam in your favour.

We would therefore appreciate it very much if you could be good enough to send us the documents returned to you under our letter to you dated the January 30, 1975 in order to prepare the necessary transfer and have it registered. We undertake to return the said documents to you.

Our Mr. Suppiah is also making arrangements to raise a loan to pay off the amount due to you on the said three charges and interest and if he is successful in raising the said loan then we would send you all monies due to you under the said three charges and the Draft Discharge of Charge for your approval and execution in due course.

Yours faithfully,

Sgd.

c.c.

Mr. K.V. Devan,
No. 681 Main Road,
Kulai Besar,
Kulai."

But this is to be noted - if there was a buyer before, surely the defendant would have mentioned it before they wrote P.43 as he had done in P.43. In fact earlier in P.40 there was a real need to mention about the buyer, because in that letter they wrote to the Bank, saying that they had written to the defendant, asking when they (the plaintiff) were going to discharge their liability. But still no mention was made of any buyer. P.40 says:

"SUPPIAH & SINGH Tel: 2254 No. 20, Jalan Ah Fook,
Johore Bahru,
West Malaysia.

29th. Dec., 1974.

M/s Chung Khiaw Bank Ltd.,
No 4, Kulai Besar,
Kulai,
Johor.

Dear Sirs,

Re: Mr. K.V. Devan – Legal Charge on CT 13817 Lot 6025 Mukim of Senai-Kulai in the name of Mdm. Tara Rajaratnam.

We thank you for your letter dated December 26, 1974 and we are very sorry for the delay in settling the matter.

We have, however, written to our client to give us instructions whether they would pay the balance due to you on the charge and if we did not hear from them we will return all the title deeds within the next 10 days.

Yours faithfully,

Sgd.

c.c. to

Mr. Devan.

Please let us know the position on this matter."

Nor has that letter mentioned in P.40 allegedly written to the deceased produced. I can only infer that the letter was never sent or, there was no buyer, because the production of that letter would have been highly prejudicial to the defendant. But I am sure any lawyer with any sense of property would be concerned to let the Bank know, if in fact there was a buyer, the real reason why they were holding back the deeds in view of the undertaking they gave in P.27, because their *bona fide* might be questioned by the Bank, sometime or another. It will be noted that the letter P.40 was also copied to the deceased supposedly reminding him about payment, but again there was no mention of any buyer. It is seen therefore that there was actually no buyer and the only reason why the defendant had refrained from paying the Bank was clearly because they wanted, while they held the title deeds, to delay the payment until such time as they chose to pay. But this situation was changed because after persistent insistence from the Bank they had to return the title deeds, which they did in P.42. But two days later in P.43 they asked for its return and if we follow the defendants' reasons for writing their letters it was I suppose again because there was a buyer, but they had to say they had bought the property this time as this was obviously the only way they could compel the Bank to return them as P.27 would bear testimony. One will at once notice from P.43 that the defendant is telling the Bank that they are the owners subject only to the charges, which the Bank already knew. Which means that they were representing to the Bank that they were the absolute and unqualified owner. It at once becomes evident that P.43 itself is a fraud and this time the victim

A was the Bank, because if we follow the defendants' contention they said their sale was still, despite what happened after March 30, subject to P.30 which required them to pay both the CKB and the HKB but P.43 however says they had to pay CKB only. P.30 also says that they had to pay the CKB \$103,000/- which they knew had to be done on the outside within a week, which they had not done. Thus, in saying in P.43 that they had bought the property subject only to the 3 charges, they had fraudulently said they had bought when they had not and also they had not disclosed the fact also that they were bound by the terms of P.30 and had not satisfied them, but nevertheless they maintained their disguise in P.46, 48, 50, 54, 55 until the deed was released and using the undated transfer in their possession effected the registration of the title in their name while at the same time they kept matters in confidence by not sending the plaintiff the aforesaid letters. All this was evidently done in order to get the title deeds. That would however be fraud. But if the defendants had such audacity to deceive the Bank, despite all the lawyers at its disposal, can it be doubted that the plaintiff, as the subject of their deception, was just a small fry to them? But like the deceased, evidently no report was made by the bank of this incident to the Police. Maybe the Bank was afraid, considering the defendants' high social position. Or, may be, acting quite irresponsibly, they could not care less what happened because they were not directly affected. But it seems to me that a clear case of cheating would appear to have been committed against the Bank. Unless of course, the Bank know what was afoot and was a party to the fraud and an agent in passing the title to the defendant, which then would merely make out, even more so the plaintiff's allegation against them. I think I need only to remind myself of the principle which says that a representor must not merely abstain from positive falsehood, he must not knowingly or willingly omit anything which is required to render completely true that which without it is not completely true. A statement which omits such matters is a lie in one of its most dangerous and insidious forms. (*Halsbury's* Vol. 26, Para 1563). Three things have emerged from the disclosures made in P.43, that firstly, there was no buyer before the date. Secondly that there could not have been any variation of P.30, and the alleged promise by the deceased to reduce the overdraft to \$92,000/- because otherwise the defendants would have disclosed them in P.43 itself, since they would certainly not like to be told later by the Bank and not get their title deeds, simply because they had to pay \$116,000/- which was the amount due at the date of P.43

instead of \$92,000/-. The alleged promise by the deceased to reduce the overdraft to \$92,000/- was clearly false because if the 2nd. defendant says in P.43 that he had bought the property and that he, instead of the deceased was finding the loan to pay off the debt, then how could he also at same time be saying earlier that the deceased himself was going to pay the debt instead by reducing the overdraft to \$92,000/-. But apparently both the statements were false and a lie because the 2nd. defendant admitted it was not true even that he was going to raise a loan. Hence the alleged agreement by the deceased to reduce the overdraft to \$92,000/- could not be true. It follows the allegation that the deceased told the defendants that he and his wife could not find a buyer and did not have the means to repurchase the property themselves cannot also be true since the alleged agreement to reduce to \$92,000/- came about because the plaintiff allegedly could not buy the property. P.30 obviously had never been varied. All these allegations of the plaintiff were nevertheless made because the defendants had never fulfilled its terms and had never intended to, and the \$92,000/- they paid was without regard to P.30 but purely in order to get the title deeds. But I think it soon became pretty obvious to the 2nd. defendant in the course of the trial that his bogus "buyer" story was not selling well because, when P.W.(5), the officer from CKB gave evidence he seized the opportunity, to say that the deceased wanted to keep the account open in anticipation of the shares going up. But it was plain this was an afterthought because it had not been mentioned anywhere before. It was not pleaded as the "buyer" excuse was pleaded, but since the "buyer" was pleaded as a defence, we would expect this would too have been pleaded. But the new excuse was even more self-effacing, because if the deceased was keeping the account open in anticipation of the shares going up, he could hardly also be anxiously wanting to sell the land at the same time. But even then the "shares" theory was no more plausible. The matter came about when D.W.(5) was asked why at one stage the plaintiff's account appeared to show the deceased was owing the Bank \$140,000/- and not \$90,000/- as the Bank's account shown earlier stated. He said that it was probably due to the shares being part of the property charged, which was valued at about \$30,000/-. It would appear after deducting, the amount would be about \$92,000/- which was what was asked for by the Bank of the defendant for the purpose of discharging the charge. In other words, the land could still have been discharged without discharging the shares and therefore the defendant's contention

A that the plaintiff wanted to retain the shares in anticipation of the shares going up, could hardly be conceivable. It was also alleged that the plaintiff had agreed to pay compensation to stay on her land. But that would be saying that she had agreed to pay, although she was not obliged to. Because it must necessarily follow if P.31 says that the defendant was not to sell the land for one year, then in the absence of any clause regarding vacant possession, that the plaintiff would still be allowed to continue to stay on the land. In any event, it would be extremely harsh and unjust if not ridiculous that she should in theory be asked to vacate even before the defendants had paid one cent of the \$220,000/-. Which person in this world would agree to such a term? Anyway, there was not a scrap of evidence by the defendants that she had agreed to it. How absurd this assertion is can be seen from the answer given by the 2nd. defendant, himself. He said that she would have to vacate only if he had paid the \$220,000/-. He was asked "It follows if you do not pay the \$220,000/- she does not have to vacate?". Answer: "Yes, I agree". But when it was put to him "that the plaintiff and her family were entitled to stay on the property at least until you paid the \$220,000/-", his answer was "I disagree". But in the light of the earlier answer, the latter's reply was clearly meaningless. The allegation is in fact false as one will observe. In the Sessions Court action No. 146/76 for eviction, the 3rd. defendant in their statement of claim at para (2) said "The first defendant who is the wife of the 2nd. defendant was the owner of same until she sold same sometime in July 1975. Both defendants after the said sale continued to remain and occupy the said land and premises free from any rent". But the point is if the occupation was free, how could the defendants say the plaintiff had agreed to pay compensation. They said there was a difference between a rent and compensation, but how could there be one if they also admitted that the compensation was also in respect of occupation of the premises and nothing else. In any event, if there was a difference, anyone would expect them to mention it in the said Para. (3).

I There was an attempt by Counsel for the 3rd. defendant to say that there is a great deal of consistency in the defendant's case in saying that there was a variation of the agreement because the \$92,000/- is actually the working after the deduction of \$11,000/- from the \$103,000/-, to be paid to the CKB under P.30, the \$11,000/- being the amount of the overpayment which the 1st defen-

dant had to make to the HKB. But that only prompts me to say this: Why then did the 1st. and 2nd. defendants not come out and say so, in the witness box? Why have they to hide behind the back of Counsel for the 3rd. defendant's submission which is not evidence. What were they afraid of? After all, he was only defending from the side-effect of their own initial ill-doing. Perhaps they were afraid that if they stood up in the box they might be strenuously attacked and may be groping for an answer, as they had clearly displayed from time to time in the course of the trial. Their silence to me is merely a mute acceptance that Counsel's argument has no validity. Secondly, we have no evidence anywhere that Counsel's calculation as to how the defendant and the deceased worked out the \$92,000/-. Thirdly, the \$92,000/- would only be the calculation based on the \$103,000/-. It does not take into account the sum of \$6,000/- or so, which the defendant had to pay for the interest and the balance to be paid to the plaintiff which she says had not been paid to her. Is Counsel saying that the deceased was prepared to forgo the \$6,000/- for nothing, that would be preposterous. Why should she? Counsel had not given the reason. Conveniently, of course the defendant says the \$6,000/- has gone towards payment of the compensation for staying on the land. But, I have already dealt with this point earlier, where the reason given by the defendant in charging compensation was shown to be a mockery of his own sense of reasoning. And last but not least the idea of the \$92,000/- being agreed upon by the deceased could hardly be true in the face of the conclusion which I have come to and discussed in connection with P.43 which is directly opposite the very idea of there being such an agreement.

The defendant's intention to defraud the plaintiff was clearly evident by their deliberate act of transferring the land to them without first informing the plaintiff. The very fact that they were found contradicting as to the duty to inform only point to that guilty intention. The 1st. defendant said there was a duty to inform but it was the 2nd. defendant's responsibility not his. And he added also because Yeow & Chin represented her. But if there was a duty to inform, what difference does it make whether she was represented by Yeow & Chin or not unless they had told Yeow & Chin to tell her on their behalf. There was no such evidence. But if they knew there was a duty but nevertheless refrained from informing her it simply meant that they were dishonestly disposing her of her property, which was plain fraud. In any event

A was Yeow & Chin representing the plaintiff at the material time? It does not appear to be so. Two letters P.49 and 52 were brought into focus by Counsel in highlighting this point. P.49 reads as follows:—

B "YEOW & CHIN
ADVOCATES & SOLICITORS 16-B, 2ND FLOOR,
JALAN STATION,
JOHOR BAHRU.

28th. June, 1975.

C Ms. Suppiah & Singh,
Advocates & Solicitors,
Johore Bahru.

Dears Sirs,

Re: K.V. Devan — C.T. 13017, Lot 6025, Mukim Senai-Kulai in the name of Md. Tara Rajaratnam.

D We act for M/s Chung Khiaw Bank Limited, Kulai Branch and the registered owner of the above mentioned property.

E We are instructed that upon your payment to us Solicitors for our clients the sum of \$140,000/- within two weeks from the date hereof we undertake to discharge the charge from the Bank and forward the said title to you to enable you to prepare the transfer of the said property.

Kindly let us hear from you soon.

Yours faithfully,

F Sgd.

c.c. CKB Kulai
Madam Tara."

"P.52 reads as follows:—

G YEOW & CHIN
ADVOCATES & SOLICITORS 16-B, 2ND FLOOR,
JALAN STATION,
JOHOR BAHRU.

Our Ref: YHC/WRM/0869/72
Your Ref: (26)F.10/74.kjp

1st July, 1975.

H Messrs. Suppiah & Singh,
Advocates & Solicitors,
Johore Bahru.

Dear Sirs,

Re: K.V. Devan — C.T. 13917, Lot 6025, Mukim Senai-Kulai in the name of Md. Tara Rajaratnam.

I We thank you for your letter of the 29th. ultimo and the contents therein noted.

Further to the telephone conversation between your Datuk Jagindar Singh and our Mr. Yeow this morning on the subject we are instructed that our client will discharge the Charge on the above property and deliver the said

title to you upon your payment to us as Solicitors the sum of \$92,000.00.

We hope to hear from you soon.

Yours faithfully,

Sgd.

RECEIVED
DATE 1 JUL 1975
TIME 2.40 p.m."

The 1st. defendant said that in P.49 and P.52 Yeow & Chin was clearly representing the plaintiff. P.52 is really, as can be seen, an explanation of P.49. But one thing will strike one as being quite evident, that in P.49 the legal firm is using the word "clients" in the plural as clearly referring to both the Bank and the registered proprietor, whereas in P.52, it refers to the word "client" in the singular. It is plain that "our clients" in P.52, the solicitors were referring to the Bank as having asked for their \$92,000/- and not the registered proprietor, so when they spoke of "our clients" in P.49, asking for the \$140,000/- they must be referring to the Bank only. This conclusion must be true because the 1st. defendant himself conceded that where solicitors are acting for a bank in the discharge of a charge, the normal practice is that they would also be acting for the owners of the property for the purposes of the discharge only, but he added that in these circumstances they would only be asking for the money actually due to the Bank. My only comment on the last bit of the defendant's answer is that I cannot agree with him more than that is what the Bank normally does. But his answer speaks for itself also that the Yeow & Chin at all relevant times were not acting for the plaintiff. If they did it was only for the purpose of the discharge. The plaintiff was asked by the defendant to sign several documents at the house on the 30th. without explaining the contents of each document. The transfer shows the consideration of \$220,000/- to have been paid and acknowledged as having been received, but not one cent of that sum had in fact been received. But the document reads as if she had received. Anyone would have expected that the sum would be paid almost immediately, otherwise why would she be stupid enough to sign the form; She had trusted the 2nd. defendant to do the needful, but he flouted it instead. The 1st. defendant's act of attestation on the form was also indicative of fraud. He was supposed to have attested the plaintiff's signature in his presence on the 5th. of July but which never happened, to everyone's knowledge. He could easi-

ly have come back for her signature after they have paid the money, which obviously they would not do without bringing down to ruin the house of evil which they were steadily building. Their method of doing things was so baffling that evidently even Syed Othman J. (as he then was) in the 3rd. defendant's application for removal of the plaintiff's caveat was misled. For one thing the learned trial Judge thought as I would have expected him to, that the 3rd. defendant was a *bona fide* purchaser for value because he said at Page 8 (Judgment) "unless there is cogent evidence I would presume the applicant is a *bona fide* purchaser for value." But of course the cogent evidence was not forthcoming from the 3rd. defendant at least not until the thought of being badgered in this very court had loomed before him. Second, the learned trial Judge also had been completely misled in thinking that the money had in fact been paid because at Page 6 he said "The indications in the transfer document are that performance must have been completed by Dato Suppiah as the material parts in para (a) and (b) in the consideration of sale read "... in consideration of ... P. Suppiah paying". As we know it the money had never been paid at or before March 30 and the contract had never been performed in accordance with the agreement. Nevertheless the 2nd. defendant had urged that the one year should date from the 30th. March and not from the date of registration of the transfer. And in doing so he naturally did not hesitate to say that Syed Othman J. also had said so. But would the learned trial Judge had said the same thing, if the facts just pointed out been made known to him. I am not very sure. I would be inclined to think he would have said otherwise. Such was the state of ambiguity the defendants have created in everyone's mind. But the use of ambiguous representation is indicative of fraud if the ambiguity was employed for the purpose of misleading the representee — (*Halsbury's* Vol. 26 Para 1561). The contradictory nature of the statutory declaration of the 2nd. defendant (P.99) in support of his caveat also speaks well of his demeanour. He mentions in para. 2 therein (See Page 218) that by an agreement on the 30th. March the plaintiff was to pay interest up to the date of actual transfer. It was naturally asked (Page 218) why he had not mentioned the oral agreement and had not reproduced P.30 to which he replied there was no necessity. But was not his omission because there was no mention of interest in P.30 and P.30 indicates the \$220,000/- had been paid, whereas the statutory declaration said that it had not been paid and he might be in difficulty answering why he had not paid. The defendant finally admitted

it was not true that he said the plaintiff had agreed to pay interest. But what credit then can the court give to a solicitor who had no compunction to lie and perjure. It should be treated as wholly unworthy of credit, on this point alone. He said in the statutory declaration that under the agreement the plaintiff "would" transfer the land to him; but that would be contrary to saying that the land had been sold outright to him. He was merely restating P.30, he said. But P.30 in fact say the land had been transferred to him. Thus if he had not paid the money and the land had not been transferred how could there be a sale. Again if in fact he had sold the land to 1st. defendant then why did he not say in P.99 that the 1st. defendant paid HKB at his direction.

Since the provisions of P.30 and 31 were not finally renounced until the transfer was effected into the 2nd. defendant's name on the 5th. July, 1975 the events subsequent to March 30 must, contrary to Counsel's argument, be part and parcel of P.30 itself as they would show the state of mind of the defendant on that date (S.8(2) Evidence Act) as it was manifest that the defendant's *modus operandi* was to obtain the title deeds, ignore the memorandum, refrain from paying CKB and thus forcing the plaintiff to reduce the overdraft himself and when the opportune moment came for them to pay the Bank, discharge the charges and register the land in his name, while all the time the plaintiff was kept completely in the dark.

I shall now deal with the subject of Collusion. As can be seen I have referred to the defendant as a whole or singly, as the situation may arise. But it does not make any difference, that I have mentioned one and not the other since the allegation is one of collusion to commit fraud. It will necessarily cover all the defendants except where it is otherwise stated or unless the circumstances will clearly indicate it refers only to the one and not the other or it refers only to the 1st. and 2nd. defendants and not the 3rd. I think in this connection it is relevant to cite section 10 of the Evidence Act which says:

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of those persons, in reference to their common intention after the time when the intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

A The act of colluding is in effect the act of conspiring with one another to commit an actionable wrong. The nature of the evidence which implicates the parties concerned would of course vary from one to the other.

B I shall deal with the 3rd. defendant's evidence in due course. I think as far as the 2nd. defendant is concerned the evidence that had been adduced affected him directly. The oral representations to the plaintiff on the 30th. March, the preparation of P.30 and the inclusion of 31, and the letters to the Bank and the Collector of Land Revenue, the registration of the title deeds, were evidently positive acts of the 2nd. defendant. The transfer was by him to the 3rd. defendant. It had been urged that the 1st. defendant was not involved, since he said nothing and did nothing and only came into the picture on the 30th. March as an innocent bystander and coincidentally only to attest to the plaintiff's signature. All the rest it was urged were done by the 2nd. defendant and he had nothing to do with it. But I do not think the 1st. defendant could so simply absolve himself. His visit to the plaintiff on the 30th. was prompted by P.W.(2) being in difficulty with him in regard to his overdraft at the HKB. His firm had already written P.27 earlier to the Bank asking for the deeds with a view to charging it for an increased amount. He had also a meeting with the deceased and the 2nd. defendant from which P.30 was later prepared by his firm and later produced at the house, which was essentially to get over his and P.W.(2)'s problem. P.30 itself expressly requires that one of the payments under it be made to him. Whatever the reasons may be for which the parties met on the 30th., one thing is thus clear, the 1st. defendant was directly interested in the outcome of the meeting on that day because whether the transfer was a purchase by the 2nd. defendant or merely given as a security it directly or indirectly affected his commitment to HKB. He was therefore far from being just as uninterested party as he claimed to be. He was, as I said, the principal and the 2nd. defendant his nominee. Whatever representations were made by the 2nd. defendant in effect were direct representations made by him also because, in my humble view, he was for the reasons given an inalienable part of that representation.

I In any event the 1st. defendant cannot deny that if the property was bought by him either initially or subsequently from the 2nd. defendant, he cannot hold it without being tainted by the fraud committed against it by the latter. In this respect I need only cite what the Privy Council said

in *Assets v. Roihi* (at page 210) that "Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents." The 1st. defendant cannot extricate himself from the fact that he was present at the meeting on March 30. He heard what were said by the 2nd. defendant, what representations were made. He saw what took place and what did not take place. If the 2nd. defendant had falsely represented to the plaintiff the facts then since he knew that they were false and chose to remain silent instead then he must be guilty of fraud too. The very fact that the land was acquired by him but surreptitiously kept with the 3rd. defendant is enough to show his participation in the fraud. He said this was done to enable it to be sub-divided and converted, it being more expedient since he did not enjoy good relationship with the authorities. But the letter written by his firm to the Collector of Land Revenue Johor Bahru seemed to say otherwise. The letter P.100 reads as follows:-

"SUPPIAH & SINGH
ADVOCATES & SOLICITORS

Ref. No. JS/KP/11
Ref. No. PT. 19/76.

No. 20, Jln. Ah Fook,
Johore Bahru,
West Malaysia.
Tel. 22254.

Date: 31st. Jan. 1977.

Pemungut Hasil Tanah,
Kerajaan Johore,
JOHORE BAHRU.

Dear Sir,

Serahbalik dan Kurnia Semula Tanah Lot 6025 (C.T. 13817) Mukim Senai/Kulai, Johor Kerana Rancangan Perumahan.

We act for Mr Arul Chandran who is the owner of the above land. Our client understands that this application for sub-division of the above land has already been approved by the State Government subject to certain conditions. He instructs us to inform you that he accepts all the conditions the Government has imposed on the land for purposes of sub-division and will abide by all the conditions. He further instructs us to surrender the title deed of the above land to you for purposes of surrender and realienation to be done by the Government. Title deed no. CT 13817 Lot 6025 is hereby enclosed for your necessary action. Kindly acknowledge receipt of same.

Yours faithfully

Sgd.

Pengarah Tanah dan Galian, Johore.
Fail tuan 9/76-55."

It seems clear that he did, despite what he said, enjoyed good relationship with the authorities otherwise it does seem strange that he had confidently expected the authorities to approve his sub-division even before they had approved it. He said that the P.100 was written by his firm and not by the 2nd defendant and him and when they wrote they were acting in their personal capacity. He was naturally asked, rather gleefully, by Mr. Cashin whether the authorities had liked his firm but not him in his personal capacity, to which he said he did not know. But if he did not know, it obviously meant that there was no truth in saying that he did not enjoy good relationship with the authorities and the property would have been registered in the 3rd. defendant's name only to hide it from the plaintiff, having fraudulently obtained it from her. The court must also draw the necessary inference against him from the letters written by his firm, although written by the 2nd. defendant. He had not disassociated himself from those letters as would necessarily exclude him from the effect to be given to them. He merely said that in some of the letters that he did know them. But whether he knew or not, is a matter of assessing the evidence, although it is difficult to see how he would not know. His demeanour in respect of just one letter would prove otherwise. This is in connection with P.33. The letter says:-

"(363)F.10/74.kjp.
AC 146

13th June, 1974.

M/s. Chung Khiaw Bank Ltd.,
No. 4, Kulai Besar,
Kulai,
Johore

Dear Sirs,

re: Mr. K.V. Devan - A/C 146 - Legal Charge on C.T. 13817 Lot 6025 Mukim of Senai - Kulai in the name of Madam Tara Rajaratnam

We refer to your letter dated June, 10, 1974.

We are in the course of preparing the discharges of the charges and we will send them to you for execution.

In the meantime please let us have particulars of the person who has powers to execute the discharges and also a statement showing the amount due including interest as at the 30th of this month.

Yours faithfully,

Sgd."

He was asked whether he knew about P.33. He said he did not know, yet P.33 was written in reply to CKB's query in P.32 asking when they were going to discharge the charge as the defendant on behalf of the deceased and the plaintiff had indicated that they would do so in P.27. In my judgment that since he said he knew about P.27 and 28, that he would also know about P.33 which was merely in pursuance to his letter in P.27. He had evaded the issue because evidently he would, although he knew, rather leave them to the 2nd. defendant to answer. If he knew about P.33, he must also have known about all the other letters. In fact he must be deemed to know. It would be a very dangerous precedent indeed if the court were to say that Counsel are not bound by their own words as expressed in their firm's letters when their letters are the very means by which they act and conduct themselves in relation to the public, in particular their client. For the court not to act strictly and firmly in this matter would necessarily incur the public in suffering a loss without a remedy and may uncompromisingly place them in a situation of great jeopardy. A lawyer cannot be heard to say that he has left his firm in the hands of others who has miserably defaulted, or failed. He must equally suffer that default or failure otherwise he will be lending his name only to commit wrong. The choice is his to throw up his brief and his firm or to accept the consequence of being a part of one. The necessary assumption is therefore that the letters were known to him and it was upon him if necessary to advert to them in the agreed bundle to say that he had no knowledge of them, of which he had not done. I have discussed on the significance of these letters earlier, where my analysis then was, it would not carry the defendant's assertion any further than what I had said that there were no buyers for the land and were merely sent from time to time because CKB was anxious to know why the defendant were keeping the title deeds and as promised not discharging the charge. The 1st. defendant cannot excuse himself particularly from P.43 and the false representation made therein by his firm. In saying at the outset that "We act for one Mr. Suppiah ..." he had categorically associated himself with its contents.

I shall now deal with the 3rd. defendant's case. I have set out the facts bearing on his case earlier and I do not propose to repeat them. As I have said earlier the 3rd. defendant can exonerate himself only by stating that he was a *bona fide* purchaser for value of the land. This is the defence afforded to him under section 340 of the National Land Code, which gives him the immunity of title,

A by virtue of being such. The argument that the plaintiff must in theory be able to set aside the land in his hands first apply here also. The stand taken by the 3rd. defendant initially was that he was a *bona fide* purchaser for value. This must necessarily be construed from his defence at the time when the trial began. Para. 12 of the Statement of Claim says that the transfer of the property into the name of the 2nd. defendant and later into the name of the 3rd. defendant were procured and effected fraudulently by all the 3 defendants. Particulars of fraud of the 3rd. defendant

C "Colluding with the 1st. and 2nd. defendants and causing the said property to be registered into his name. Para. (d) (iii) with knowledge that he was not a *bona fide* purchaser of the said property for value and (iv) with knowledge that he was accepting the transfer of the said property into his name only as the nominee or agent of the first and second defendants, and only for the purposes of posing and projecting himself as a *bona fide* purchaser for value so as to attempt to defeat the plaintiff's right to redeem and recover the said property.

E In his defence in para. 22 the defendant says the defendants repeat paras. 3 and 9 above and deny each and every allegation contained in para. 12 of the statement of claim including the allegation of fraud and the defendant put the plaintiff to strict proof thereof."

F The denial that he was not a *bona fide* purchaser, simply means that he was a *bona fide* purchaser, and it would have been a good a defence as any and if the 3rd. defendant could prove it, then there would be no case against him. But that was not to be. On the 7th. day of the trial as related earlier he made a dramatic round about turn. He asked, and with no objection from all sides was allowed to amend his defence, to say that now instead that he was in fact the nominee of the 1st. defendant and was holding the property on trust for him. So, we got a situation where after disguising his true identity through the courts from the lowest up to the highest, through Rodyk & Davidson, his own partners, the Law Society and the Collector of Land Revenue, and half way through this court he now says he was a pure simple lamb who knew nothing and heard nothing and because his friend the 1st. defendant told him he wanted to use his name for the purpose of applying for conversion or subdivision of the property, so he accepted, just as a pure and simple lamb would. But that was all very nice and sweet to say after all the damage that had happened to the plaintiff in particular and the courts in general. But is he really now saying he is at last a lamb not a wolf under the lamb's wool. To me that he is not a lamb but a fraud. He is a most vicious and dan-

gerous fraud, because he now says he wants to come up with his true colours, since the one that he wore earlier was false and fictitious; but the danger is that the court does not know whether he is not also a chameleon changing his colour as suits him, otherwise it is hard to explain why he also said that he wears the colour that the 1st. defendant wears legally, which means that if the 1st. defendant later was found out to be wearing an illegal colour he would abandon him and go back to the colour that he chooses to wear and say I never intended to wear the 1st. defendant's colour in the first place. But of course the 1st. defendant had no other colour to change to, like him. He had only one colour. If in fact he is that simpleton of a trustee then why has he lied all these years that he was a *bona fide* purchaser, and not said it before? He said he had never stated or asserted at any time that he was a *bona fide* purchaser for value almost saying he would seal his fate on proof that he had said it. But is not the assertion made by him in this very case in his pleading, as just pointed out, not such an assertion? Was not his plea at the Sessions Court that he was a registered owner not such an assertion? (See Statement of Claim). Because how would anyone become a registered owner, properly and legally constituted, save of course, it was for love and affection, without having been first a *bona fide* purchaser for value. It is plainly implicit in being a registered owner. That is the way everybody knows it, and it is the only way it has to be done, otherwise the whole system of land registration and administration will become a mockery and a farce, and the subject of deception and ridicule by people as the 3rd. defendant. It will in fact be put to a standstill. He says he can register himself as the owner and lay hidden behind it as a trustee but that would defeat the very purpose of section 340 of the National Land Code; how are the courts in this country, let alone the Collectors, going to protect the interest of the genuine registered proprietor when an imposter like the 3rd. defendant can bandy the term about and find shelter under it. It would uproot altogether, if I may say so, the whole subject of what I consider is the most important feature in land registration, that is to give the person on the register, as owner, the immunity of title which cannot be defeated except in the cases given in the exception mentioned under section 340, unlike the English system of land tenure, purely by virtue of registration. If any Arul Chandran can come along and for some devilish scheme of his own which he keeps to himself, register himself as owner when he knows he is not, then there is no point anymore in having the system of

A land registration. By a stroke of the pen the said Arul Chandran has changed that because he says it could be done and he need not say anything since the burden is on the plaintiff to prove that he is not a *bona fide* purchaser. But he could not run away also from the fact that in so doing he is also deceiving. He cannot have it both ways. But I have no doubt that with his wide experience of the law, the 3rd. defendant did not mean what he said but understandably he had to pretend he did not know, as long as he thought he could hoodwink everyone by the magic word "registered owner" and "*bona fide* purchaser", because everyone knows it is not easy to dislodge a registered owner especially if a fraud had been executed with such subtlety by people who are least expected to commit them.

D But now that matters have surfaced he tries to say that he was not a party to the preparation of the pleadings at the Sessions Court, nor seen or been a party in the preparation of any pleadings in any of the courts pertaining to this episode except the one prepared by Mr. Ronald Khoo, as if saying he does not trust Ronald Khoo but trusted the other Counsel; I wonder therefore why he had discharged Mr. Chin, caused himself to abscond for a day from this court, went high and low looking for Mr. Ronald Khoo to be his new Counsel instead. His change of stand meant also that since the arrival of Mr. Ronald Khoo, he has suddenly woken up to look at the pleadings and given his personal attention and approval, which he said he had not done before. But he has not told the cause for his sudden change of attitude. That is very important to me because in the absence of any cogent reason I would conclude that he would also have found it necessary to see and approve the other pleadings in the care of the 2nd. defendant in the Sessions Court right up to the Federal Court and the caveat proceedings before the High Court, unless of course he says the 2nd. defendant and Mr. Chin possessed such vastly superior knowledge of the law to Mr. Ronald Khoo that he could even afford not to look at the pleadings. But he has not said so. I am also incidentally somewhat advised by the agreed bundle that the defendant was at some stage to lead a Queen Counsel in some notable case in Singapore. Is he seriously saying therefore that some eminent Counsel in England was going to be persuaded by him to descend in Singapore to be led by him whose sense of efficiency, preparation, general awareness and concern were such unless he was lying, I feel certain he was, that he was prepared to leave his own pleadings, that would decide his own fate, entirely in the

hands of others however competent those others may be. What would I wonder be the fate then of others' pleadings left in his supposedly safe hands, leave alone that of that notable case in Singapore. He said he had to give his stamp of approval to the suit being filed against the plaintiff at the Sessions Court because it had to be in his name, meaning that his name was of no consequence and could be bandied about that it did not matter what happened to it. But if he had any name and reputation at all surely his name would be very much at stake at the Sessions Court because if he lost, the whole of Singapore, let alone the legal fraternity, would descend upon him with accusing fingers pointing at his integrity and honesty in acquiring it in the first place. They would wonder why a lawyer, who should know better, should lose a case against a lady, who says she owns the land unless they say he had improperly acquired it from the start. Then of course they would exclaim with horror and disgust that a lawyer like him could be so dishonest. It would be followed by his whole career and reputation being in jeopardy and not the least his name being smeared and put to shame. Is he saying that under those circumstances he would, nevertheless in an air of absolute abandon just leave things in the 2nd. defendant's lap and cease to look back. I think he is being plainly dishonest. I believe he would not only have looked at the pleadings, he would have left no stones unturned to see that it gets through the scrutiny of the courts, because whatever happened he knows people would think, because he puts his name down as the registered proprietor, that he was truly the owner of the land, and since he wanted to be in disguise, people would not know he was a great pretender. If he did not tread carefully therefore, the whole scandal would be exposed.

But the strange thing was, however, he adopted the pleadings in this suit sometime in June 1981 when he first saw it although he said he had never seen his statement of claim at the Sessions Court and he had never said he was a *bona fide* purchaser for value although it does appear in evidence that he did at the Sessions Court. It does show how contradictory he can be. The reason it seems why he says he adopts this suit but not the other and has never seen it is because in the Sessions Court he positively said he was a registered owner and by necessary implication a *bona fide* purchaser for value whereas in the other he did not although it does not seem to me to make any difference because the effect of denying in this suit to the allegation that you are not a *bona fide* purchaser for value

A implicitly means you are affirming the fact that you are. But needless to say, desperation can drive one to do things which one does not normally do and therefore he had urged that he was not at the Sessions Court on the 12th. of May, 1976 clearly avoiding being told he was present when his case was being heard although the record showed that he was present. This was prompted by Mr. Majid, Counsel for the plaintiff having, on the record on the 30th. said that the defendant was present on the 12th. of May. But we are not concerned with what Mr. Majid said. We are concerned with what the court recorded. And the way the court had recorded it showed that when he was absent as on the 30th. of May and the 24th. of June he would be recorded as being absent, but on the other occasions, the court was silent. It must be assumed therefore that when the court does not record that he was absent it must be intended to mean that he was present, otherwise there was no point in the presiding officer recording only when the parties were absent. He might just as well have not said it leaving it to conjecture whether the parties were absent or not. An officer with some experience would normally have his mind drawn to whether the parties were absent because the question of striking off the action might arise and he would specifically record that fact. The presiding officer from the 6th. till the 30th. May when this incident took place was Encik Ahmad Fairuz, the Senior President who is currently the State Legal Adviser, Johore. I cannot forsee why he would have recorded that the plaintiff was present, on the 12th. of May if in fact he was absent or for that matter on the 6th. or the 10th. where the President had been silent when likewise it must be assumed the defendant was present. If therefore Mr. Majid had also said that the 3rd. defendant was present on the 12th. of May he was merely echoing what the President himself had recorded. Nevertheless the defendant was not going to be dismayed or discouraged. He was determined to defy the record; he embarked on a journey during the adjournment to see Mr. Majid and apparently Mr. Majid despite of what he had said now says he was wrong. But why has he not called Mr. Majid to give evidence? Since all I have is the evidence of what Mr. Majid said on record and what the President recorded where between Mr. Majid and the record it is clear which one must prevail. Mr. Majid's absence meant that Majid had said what he said at the Sessions Court. The defendant said he checked with his Secretary's diary but the diary was never produced. But more significant however is how was it that he had nevertheless made that long journey to Kuala Lumpur to hear the plaintiff's appeal in this suit, if

he had not made that comparatively short journey to Johor Bahru just across the causeway to hear it also at the Sessions Court, unless he was lying. Because whether it was at Johor Bahru or at Kuala Lumpur his fate was still in the balance and he has to see it through at least because the thought of being scandalised would still hang over his head. In any event why must he be at the court in Kuala Lumpur at all if he said he had left matters in the hands of his Counsel if not because he was interested in the fate of his case in the same way that he would be present in court when his case was being tried in Johor Bahru. He is certainly not going to say he went to K.L. just to see the plaintiff as he seemed to have said.

The defendant said his conduct at the Law Society would show the consistency of his innocence. But to me it has merely helped to disprove instead that consistency, as the facts would bear out. In the complaint by S.K.Tan and P.W.4 Page 253 it was alleged that "The complainants were aware that Arul was not possessed of funds which would have enabled him to buy for a price of \$220,000/- or to raise funds of \$220,000/- and that he was a very close friend of both Suppiah and Jagindar and that it was most unlikely that he could be an actual purchaser from Suppiah" and his reply was "The complainants were not in a position to know of my financial standing and their speculation whether I was an actual purchaser was unfounded and malicious, to say the least". But if there was no reason to speculate that he was the actual purchaser then it simply means he must be the actual purchaser. The complaint says "It is known that Arul was a close friend of Suppiah and Jagindar and it becomes obvious that Suppiah and Jagindar needed to have a friend so that there could be a *bona fide* purchaser for value behind which any fraud which might later come to light could be sheltered. Hence it became vitally necessary to have a further sale to such a *bona fide* purchaser for value and this was provided in the person of Arul." And his reply was "I cannot comment on paras. 1 to 10 though in my view the critique is wholly unfounded and slanted". In other words he was in effect saying to the Law Society that he was a *bona fide* purchaser for value. The complaint says "It is practically unbelievable that such close friends would not enquire one of the other the reason why Suppiah should want to sell 26 days after he himself had bought the property and at exactly the same price. The complainants feel that it is hardly necessary to stress the host of obvious deductions which can be made from this tran-

saction once the larger picture is seen. However in order to assist the Counsel the following are pointed out: The defendant's reply was "With regard to para. 11 the complainants' belief are in my submission unwarranted and have no place in the complaint. In my submission no deductions can be rightly made in view of the complainants having got their facts wrong and in wanting to believe Madam Rajaratnam and Mr. Devan who are not even (so far as is known to me) the clients of either Mr. Coomaraswamy or Mr. S.K. Tan and who it would seem clear has contradicted herself in her several affidavits statutory declarations and other documents." In other words the defendant is saying there is nothing improper or unwarranted in the 2nd. defendant selling the property only 26 days after he himself had bought the property *at the same price*. That is certainly most extraordinary.

The complainant say "M/s Rodyk & Davidson have themselves a very competent conveyancing department. Why did Arul not use his own firm?" The defendant's answer was "I did not use Rodyk & Davidson as we do not have a branch" (or for that matter a proper office in Malaya), and I was happy to use the firm M/s Suppiah & Singh. In fact M/s Suppiah & Singh (and their predecessors) had been agents of Rodyk & Davidson as long as I have been with Rodyk & Davidson and moreover Rodyk and Davidson still use M/s Suppiah & Singh as their agent in Johor. I do not wish to comment whether Rodyk & Davidson have a very competent conveyancing department to deal with land transaction in Johor or the rest of Malaya as alleged in the complaint. As far as I am aware the firm does not handle any land transactions in Malaya." But I do not see why if the defendant was in Singapore Rodyk & Davidson his own firm could not have conveniently handled the conveyancing in Singapore. There appears to be nothing to prevent it. Query No. 2 was, "why did Arul not view the property?" And his answer was "I do not know how they have come to the conclusion that I did not view the property". But, to me if in fact he had viewed the property all he had to say was "I viewed the property". That he did not say so simply meant that he did not view it. Query No. 3 – "Why did he not enquire of Suppiah why the consideration should be the same even though 26 days earlier Suppiah had paid stamp fees of \$3,400/-. His answer was "This is a matter entirely for Dato Suppiah, that is, at what price he chose to sell the land." This clearly suggests that the defendant had paid for the land which he knew was not true. Query No. 4 – "Looking at the transcript of

the meetings with Arul it becomes clear that Arul in fact did not provide the consideration. Who did?" And the defendant's answer was — "It is up to me to find the financing in any way open to me within the law." Here again he is suggesting that he paid for the land which is a completely false. The next question No. 5 by the complainant was: "Why was Arul so reluctant to disclose the name of the person who provided the money and the defendant's reply was — "I have stated my reasons in the minutes. I told the meeting that I felt there was an "enemy" within our midst and this had been borne out in the complaint. I had heard that Mr. Coomaraswamy had already approached my opponent solicitors in Johor Bahru behind my back in what would seem to me very suspicious and incorrect circumstances." But the question is why should he be afraid of anyone if he had not done any wrong. The "enemy" is just a figment of his own imagination. Query No. 6 — "Why did he not use his own address on his transfer form instead of that of Suppiah & Singh (Suppiah being the vendor)?" And his answer was "It was open to me to use the address of my solicitors". But surely it would have been more convenient if one was honest, to use one's address. Question No. 7 — "Why did he not make full enquiries as an ordinary person would have done in regard to the purchase? And his answer was — "Whether I made any enquiries is irrelevant in my submission". But it would also mean that he had not make any enquiries otherwise there was no reason for him to evade the issue. Query No. 16 — "The execution of Form 14A by Arul without there passing any consideration between him and Suppiah would appear to disclose an offence under section 423 of the Singapore Penal Code (Cap. 103) if the signing by Arul took place in Singapore or section 423 of the Malayan Penal Code (Cap. 45) if the signing took place in Johor Bahru." And the defendant's answer was — "It is not true that no consideration has passed to Dato' Suppiah See Para 7 of Mdm. Rajaratnam's Affidavit in which Madam Rajaratnam had deposed 'Pursuant to the agreement dated the 30th. day of March 1974 the said Suppiah had paid the money to the Dato' Jagindar Singh ...' Where is the evidence that no consideration has passed to Dato' Suppiah?". This is clearly a blatant lie to the knowledge of the defendant because he knew he had not paid one cent to the 2nd. defendant.

Thus we see that he had time and again said he was a *bona fide* purchaser for the value of the land although in his pleadings he said he never said so and time and again he maintained he paid

A for the land when he knew it was not true and he maintained his silence about the reasons why the 1st. and 2nd. defendants wanted to keep the land with him, as the registered owner. Those were hardly conducts consistent with innocence. He said that he had orally stated that he was a trustee of the property to the Law Society; but he had not stated it in his Reply to the complainants because he was afraid it might fall into the hands of P.W.4 and S.K. Tan. But why should he be afraid of them if he had not done anything wrong. But anyway what if it should fall into their hands, frame up a case against him — to whom and for what? Why should these two be framing him for? Over a girl, and get entangled with the police themselves for fraud? I think it needs quite a lot of imagination to see the logic of that conclusion. Anyway, whatever little war he had with P.W.4 over Miss Murugesu what had that got to do with S.K. Tan. The defendant apparently had no grudge against S.K. Tan. S.K. Tan was not involved in the tug of war over Miss Murugesu. He did not seem to show any passion for her. Why should he therefore unnecessarily make things difficult for the defendant. But from the record it showed that Potts' inquiry in which S.K. Tan was present was held before the complaint was made to the Law Society. In Potts' inquiry P.78 (Potts' inquiry) the defendants had directly or indirectly said he was "in a manner of speaking" a trustee so does it make any difference whether the defendant's Reply to the Law Society fell into the hands of S.K. Tan or not since S.K. Tan already knew about it. So he kept disguise that he was the registered owner of land until the 7th. day of the trial, safe into the thought that as long as the Potts' enquiry proceedings did not go in he could continue to wear his mask and be secure. But as soon as Potts' records went in on the 7th. he had no choice but to unmask himself since he knew his game was up and he had to tell that he was not the registered owner but try as best as he could to save himself before it was too late. That must be the inevitable inference from his previous stand and the sudden round about turn he has now taken. Thus whatever his reason for being supposedly a trustee he cannot run away from the fact that he had been lying that he was a registered proprietor and the obvious reason and the only reason for that lie not to disclose it until now, after all these years, was to conceal the 1st. defendant's fraud. He seems to say the reason is because Mr. Ronald Khoo has advised him to change his stand. But surely he is not going to say that Mr. Ronald Khoo also told him to lie that he was a registered owner when he was not. And surely he is not also going to say that Mr. Ronald Khoo has just told him, and only now he realises, that he had been

lying all these years. The simple fact is he had not given any explanation why he had been lying. Be that as it may, let us see why he said he innocently kept the 1st. defendant's property with him. The 1st. defendant told him he wanted to keep it with him for sub-division and development; he therefore accepted with no question further being asked. But it is most strange that although he knew the 1st. defendant as a recognised developer that he did not ask him why he could not do these things himself. It is also strange that although he knew later the property was transferred from the 2nd. defendant to him he did not ask the 2nd. defendant why the latter should not remain on the register himself. Neither did he ask the 1st. defendant why he himself should not be on the register. It is also most strange that it did not occur to him that since the 1st. and 2nd. defendants were his good friends they might in fact find him a convenient place to keep their ill gotten property. At first he said it did not occur to him to put himself down on the register as a trustee because he did not direct his mind then to the system, but considering his 20 over years experience as a practising barrister, and what is more significant and ironical that he had previously also been a Public Trustee himself, that answer is extremely difficult to accept. Then he said he would not go on the register, even if his attention had to be drawn to it unless it is mandatory and unless it is directed by the beneficial owner since it would defeat the trust. But obviously it would have defeated the trust because it was meant to conceal the 1st. defendant and his fraud and to reveal it would have broken that secret but unlawful trust.

I think it is enough from these answers for anyone to say that under these circumstances that it should have at least aroused a suspicion in his mind as to make an enquiry. As the Privy Council said in *Assets Co. v Roihi* (cited earlier) "The mere fact that he might have found out fraud if he had been more vigilant and had made further enquiries which he omitted to make does not itself prove fraud on his part. But if it be shown that his suspicions were aroused and he abstained from making enquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him." I think the very fact that the 1st. defendant told the 3rd. defendant that he wanted the 3rd. defendant to sub-divide and develop the land when there was no question that the undertaking could have been performed by the 1st. defendant himself since he was a developer, should alone be sufficient to arouse suspicion in the 3rd. defendant's mind as to put himself on an enquiry

A but he did not. Instead he accepted the 1st. defendant's word without more and clearly abstained from making further enquiry for fear of learning the truth about the defendant's fraud or, because he already knew, and therefore fraud must be properly ascribed to him.

B But once he had made the admission that he was not the registered owner and had lied to say that he was, it would only go intrinsically to confirm the allegation of fraud against the 1st. and 2nd. defendants because the 3rd. defendant could only have done so in order to conceal that fraud.

C I should like now to touch on various points raised by the parties on the evidence.

D One would notice that the letters written by the defendant were copied to the deceased Devan when they should have been sent to the plaintiff. It seems clear that for these letters to bind the plaintiff it must be shown that she had actual knowledge of them. Suspected or constructive notice is not sufficient — (*Halsbury's* Pg. 868 Para 8611 Vol. 26.) One must appreciate the difficulty on the deceased's part, if at all he had bothered on whether to act or not to act in a positive manner. As I said the transaction was in form a sale because it was a transfer but in substance it was intended to be a security. As far as the deceased Devan was concerned he might well have ignored these letters especially since they were merely copied to him. Anyway, considering how ghastly the construction of P.30 and 31 had been made to mean to this court by the defendant we do not know how they were actually made to represent to the deceased.

G The effect of the imposition of the defendant's caveat is, as Counsel for the plaintiff said, neither here nor there. Clearly the caveat is for the purpose of preventing the plaintiff from creating further charges which should not therefore be considered as an affirmation of the contract itself if at all by her. In any event, her attention was never drawn to the purpose of the caveat, so no necessary inference could be drawn against her. She must still be secure in the thought that she would keep her land back.

H I The defendant had urged that the plaintiff's defence at the Session Court (P.109 — See Statement of Defence) was consistent with the sale because the plaintiff said she was unable to pay for the land but this again is utterly misleading. Clearly reading between the lines of the defence this was

not what the plaintiff meant. The plaintiff said at para. 4 — “the defendants for business reason were unable to repay the sum of \$220,000- *within the period.*” (The emphasis is mine). Surely in the context of the plaintiff’s assertion in para. 3 “that the adjustments were not carried out entirely within the stipulated time ...” that the plaintiff were not contending in para. 4, that they were not able to pay but they were not able to do so within the period as construed by the defendants, which they did not accept. That paragraph is as good therefore as saying “we are not bound to pay even if we can pay.” Since the averment in para. 4 is repeated in para. 6 it must therefore be read together.

The value of the land seemed to have overshadowed the real issue. We are really not concerned with what the value of the land was. We are concerned with whether fraud had been committed on the plaintiff of her land whatever the value of the land may be. Except on the question of damages I think the issue was unnecessarily raised. The plaintiff said it was worth \$1 million. She relied on Kepol’s evidence thus however unjustified that may be, she was not without any basis. But valuation is something which even Government valuers are found to be at variance and at odds with the proper market value. What the plaintiff meant probably was the land would be worth about \$1 million after the houses were built and sold. She may be right, I do not know. Judging from what the defendant had done to develop the land, I think she may not be far from the mark.

The plaintiff was supposed to have confirmed in P.56 that she had transferred the land with the house on it. A copy of P.56A the original was produced, P.56B. The plaintiff had denied she made the confirmation in P.56 although she admitted signing it because her signature is on it. I recalled Subra Naikar Counsel leading Mr. Cashin said that he had agreed to P.56 to be admitted on being told by the 2nd. defendant that this was one of the documents filed with the Town Council Kulai. It did not occur to him then of the authenticity of it. In my view, although documents are in the agreed bundle the court is nevertheless entitled to exclude them if there are reasons to doubt as to their authenticity, otherwise it will be prevented from excluding a document which the parties may have in theory forged but the other had been misled to believe it was not and had been induced to include it in the bundle. I have reasons to doubt on the authenticity of P.56 because the date on the original appeared to have been erased.

A Another, the copy does not seem to be the exact copy. The figures “5th. July 1975” the signature, “Tara” and the signature of the 1st. defendant on comparison do not appear to me to be same. The two signatures of the plaintiff clearly differ in appearance. The plaintiff said she had signed a number of blank papers. Bearing that in mind and in the light of the discrepancies in the writing in them, the authenticity of P.56 is very much in doubt. I would therefore reject it.

C She had also denied she signed the Income Tax documents CST 1 (D.6). Unlike P.56, she had denied she signed CST 1 at all. D6 is supposed to be the return by her of her income to the Income Tax Department. Since she had denied her signature and this was not in the bundle it was for the defendant to prove her signature. The document was produced through the officer from the Department of Inland Revenue one Silvarajah Arasu D.W.6. He said he received D.6 on the 24th. September 1975 but rather shockingly he did not say from whom he received it. And yet he said after receiving it he sent a letter to the plaintiff D.31 but he did not receive a reply to it surprisingly enough. I have reasons to believe that CST 1 was sent to the Income Tax Department not by the plaintiff herself but by some other person because the facts as alleged in D.6 is completely contrary to the evidence as had in no uncertain terms been established in this case. D.6 *inter alia* said in para. C(iii) that she had received \$220,000/- for disposing of the land to the 2nd. defendant. But considering what had been said in evidence, especially on the alleged payment of compensation by the plaintiff of \$6,000/- for staying on her land which I said had no foundation whatsoever and does not stand to reason, I cannot imagine for one moment why the plaintiff would have nevertheless said she had accepted the \$220,000/- and had willingly and gladly asked the Income Tax Department to charge her for something which she had not received when she had clearly not received the \$6,000/- out of the \$220,000/-. I have a strong suspicion that D.6 is a forgery and bearing in mind that the plaintiff said she had not signed it, it must be expunged from the record. Someone who is interested in proving that the plaintiff had sold the land to the 2nd. defendant would evidently be interested to tamper with the document. I think D.6 must be looked at in the light of the same comment by me on P.56A and 56B and the blank papers.

The defendant had touched on the variation on the amount paid by the plaintiff to H.L. Tan on

the recovery of the land. The amount stated on the transfer was \$10,200/- selling price and \$10,900/- buying price whereas she stated in evidence the deceased Devan sold it to H.L. Tan for \$30,000/- and she repurchased it from H.L. Tan for \$30,000/-. This point was raised by the defendant to cloud the issue that the transfer was essentially a form of security. But the fact that she said she paid \$30,000/- and sold it for the same amount, is not necessarily untrue. It is not an unknown practice for two people for their own reason not to state the real consideration on the transfer. But if the \$30,000/- was according to the defendant a concoction then the \$10,000/- must be true, because one has to be true, but even then there was only a difference of \$700/- between the selling and the buying price. Would anyone be selling 5 acres of land at Kulai about 10 miles at Johor Bahru in 1965 for \$700/- only? The defendant's valuer has not said this was the market price then. That would be the lowest ever recorded sale price anywhere. It merely bears out the fact that it was not intended to be a sale but a security.

Sivanandan D.W.5 was called to confirm the defendant's story because we will recall he took down the dictation in manuscript P.31. There is a distinct similarity between the 3 witnesses in respect of one event, i.e. the 1st., 2nd. and D.W.5 all said that the deceased Devan went out with the plaintiff and had a little discussion and a little while later they came back, and it was the deceased who said that the wife wanted to have a year's grace to repurchase it to suggest that they were at all material times dealing with the deceased Devan and not the plaintiff. Otherwise D.W.5 said he was not interested in what was going on. He was not a party to it. He did not hear any introductions being made. He was browsing through the magazines. He was not paying real attention to what was going on. He was flipping through the papers. The impression he wanted conveyed was that he was in a stupor generally, but half a stupor sometimes; but what worried me was that he fell into half a stupor only to remember those matters which seemed to favour the defendant but fell into a full stupor when they seemed to favour the plaintiff. It is the usual evidence that we often hear — I was not interested in what was going on but I was also interested. I was reading the papers but I was also not reading the papers. He did not hear the introductions, but nevertheless heard the instruction given by the deceased to the 2nd. defendants. But it is extraordinary to hear that there was no introduction by the deceased when the plaintiff said she had never met the 1st. and 2nd. defen-

dants before and this apparently had not been disputed or challenged. That is extremely odd so odd that I am of the view that there was in fact an introduction as the plaintiff said. It is almost our everyday custom especially if the husband and wife are English educated. But there was a definite purpose in saying there was no introduction as will be seen. So, the three of them said either there was no introduction or they could not remember. Nevertheless the witness could take time off from browsing the papers to see the plaintiff indicating to the deceased to go out and have a little discussion. In this respect he recalled and remembered. He however did not hear what was discussed although he was about 10 feet away and evidently within earshot. He had to say naturally he did not see or hear otherwise he would be queried what he heard and since this never happened he would be flabbergasted. The usual catch-phrase was therefore used — they were whispering. But if the plaintiff and the deceased Devan really wanted to have a very confidential discussion which is the impression given, then it was very odd that they must be whispering in the midst of their guests, when they could have left the room altogether and gone somewhere for a little privacy where they could talk quietly without causing any embarrassment to anyone. The witness said he remembered distinctly that it was the deceased who asked for the one year's grace because he had to write it down. That may be so, but it was odd that quite contrary to the general picture given the deceased had suddenly taken the initiative from the plaintiff. Although she was the one according to them who suggested to the deceased to have a side discussion. She was the one who did the reading of P.30 although apparently this was the first time the deceased had seen it and he had not read it himself and would be content to pass them on to his wife. In the little side discussion it was also the plaintiff who seemed to be doing the talking. Indeed according to this witness it was possible that there was a lot of discussion between the plaintiff and the 2nd. defendant. And yet when it came to making the suggestion about the one year's grace it was the deceased who did it. The impression was that she was talkative and inquisitive as most housewives are, as between herself and the deceased but that she suddenly lost her voice when it came to talking to the defendant, suggesting that since there was no introduction the plaintiff was too shy to speak herself and left it to the deceased to do the talking and the needful or else that the dealing were done only with the deceased. I have already said why the idea of there being no introduction is a sheer fantasy island story. If she was the quiet little introvert

they were trying to picture of her then perhaps that was the reason why she had easily been the victim of their deception. But I do not think, having seen and heard her in the witness box, she was that simpleton and shy. And being English educated with a school certificate background, I think she would have the necessary confidence to talk on equal terms with her husband and the 1st. and 2nd. defendants, with introduction or no introduction, although she was only a housewife as P.31 itself would bear testimony. The fact that after the event they never saw her again and never sent her any letter except when to kick her out of her land only showed that she would have done a lot of talking on that day and had taken them to task that they had wished that that was the last they ever saw her again which from the evidence was precisely what they did. In my judgment D.W.3 was only an incidental part of the conspiracy between the defendant to defraud the plaintiff as his evidence amply show. Contradictory and biased his testimony was unreliable and could not be depended upon.

The question of *res judicata* had been raised. I do not think it is proper for the defendant to raise the question before me again since it had already been dealt with by the Federal Court comprising of Wan Suleiman F.J., late Ibrahim Manan F.J. and Hashim Yeop A. Sani J. They had decided that the question of *res judicata* did not apply as far as this suit is concerned. I need only say one thing regarding *res judicata* – how could there ever be such a question when the evidence that had been disclosed before me had never been disclosed before Anuar J. and had by the fraud of the defendant been prevented from being disclosed before him and he had never had the opportunity to try the issue on the merits.

There is one last thing I should like to say on the evidence before I proceed to the next point. There has been a mischievous and treacherous attempt by the 2nd. defendant to discredit the plaintiff by seeking to produce the letter D.15 which she wrote to the Bar Council regarding this case as to suggest that she was wholly incapable of telling the truth since they say she was capable of accusing anyone including the court for her own ends. I do not think I need to say more than this – That D.15 speaks for itself. I cannot conceive that the suggestion of improper motive was her aim in writing it otherwise she would not have made it public by sending it to the Bar Council who might eventually send it to the courts.

A Since the letter was written by her to the Bar it was really a complaint by her to the Bar regarding the conduct of the 2nd. defendant, at the hearing before the appeal, where 2nd. defendant had appeared as Counsel on behalf of himself and the other defendants. But if she had been seen to be acting in a somewhat ill-advised manner I do not think she was entirely to be blamed. If the defendants had not acted in the way they did in this case and in all the other cases in completely misleading everyone including the courts and the latter had been taken off-guard by their deception, she would not have found herself in a position, where I am sure, she felt and acted as if the whole world, including the courts, had unjustly fallen down on her. I would say, nevertheless, that if she now feels in the light of what I have said that her letter could be misinterpreted in the worst form against her, it would not be inappropriate for her if she makes a full and unqualified apology to the right places. But that fact apart, I do not think my judgment should be clouded in any way except by the evidence and the issue that were before me as I found them, but it is most unfortunate that in attempting to detract the court's attention from the real issue the defendants had sought to exploit this incident, clearly with the intention of swaying my judgment in their favour. But whatever one may say about the plaintiff, the many and persistent attempts she made in the courts to save her land, despite the many failures and disappointments she had would only go to show the strength of her conviction and the truthfulness of her story.

G I would therefore enter judgment for the plaintiff as prayed and costs. As agreed, by the parties, I shall deal with the question of damages in due course. I should like to deal next with the 3rd. defendant's counterclaim.

H The 3rd. defendant had counter-claimed for compensation under section 329 of the National Land Code for the reason that the plaintiff had wrongfully caveated his land. But in the light of my judgment that he is not entitled to the land and had fraudulently made himself the registered proprietor, there is therefore no merit in the claim. I I would therefore dismiss the counterclaim with costs.

I should like to deal next with the question of contempt. In my view there has been a very grave and abominable act of contempt committed against the court by the three defendants that in

my view a proper punishment should be meted out to them. The 3rd. defendant with the knowledge and connivance of the 1st. and 2nd. defendants had attempted to deceive the court that he was the rightful owner of the land when he was not and thereby to induce the court to order to evict the plaintiff in the Sessions Court Case 146/76 (P.109). He had with the knowledge and connivance of the 1st. and 2nd. defendants also in O.M. 46/77 (P.113) in his affidavit dated the 23rd. January 1978, affirmed to the same effect in order to get the plaintiff's caveat removed (P.113 Page 42). In the present suit the 3rd. defendant with the connivance and knowledge of the 1st. and 2nd. defendants asserted, by way of his rebuttal, that he was a *bona fide* purchaser for value, when to his knowledge he was not. The President at Page 2 of his judgment on the eviction proceedings in 146/76 (P.109) said "I decided that vacant possession ought to be given bearing in mind that the Torrens System recognises only a registered owner, such registration carried with it an indefeasible title until proven otherwise as enunciated in section 304 of the National Land Code". Anuar J.C. (as he then was) on appeal said "The plaintiff became registered owner of the piece of land on execution of memorandum of transfer for valuable consideration. The plaintiff is a *bona fide* purchaser for value", conclusions which must necessarily be drawn from being the registered proprietor. I have already discussed Syed Othman J.'s (as he then was) judgment of this matter in O.M. 46/77 (P.113) where he clearly also has been misled. In this judgment he said "The affidavit supporting the application may be stated briefly thus. On the 10th. of October 1975 by transfer the applicant became the registered proprietor of the land, unless there is cogent reason I would presume the applicant was a *bona fide* purchaser for value." The 3rd. defendant in the said sworn affidavit said "The Registrar of Titles Johor served on me as the registered proprietor of the land a notice ...", when this was clearly not true. The 1st. defendant had categorically said "The 3rd. defendant was not a *bona fide* purchaser. He was my nominee. He was acting under my instructions." The Statement of Claim by the 3rd. defendant in 146/76 stated that he was a registered owner of the land. In so saying, being the 1st. defendants' nominee, it was also thus an emphatic statement to the court by the 1st. defendant of the same fact. It would also be the 1st. defendant's assertion in O.M. 46/77 (P.113) and in this suit because he was the 1st. defendant's nominee. The pleadings in C.S. 146/76 (P.109), and this suit, the affidavit in O.M. 46/77

A were prepared by the 2nd. defendant. In his written submission (P.111) the 2nd. defendant emphatically said the 3rd. defendant bought the land from him. In view of the 3rd. defendant's disclosure that he was never the registered owner of the land, therefore the 2nd. defendant had falsely prepared the pleadings and the affidavit and the submission with knowledge that the 3rd. defendant was not a registered owner or a *bona fide* purchaser, attempting to deceive the court into believing that he was, for the purpose of those actions and motion.

C It has been held in two cases that a barrister becoming a party to a fraud and conducting his case so as intentionally to deceive the court and a solicitor deceiving the court, was acting in contempt in the face of the court. In *Rex v. Weisz*⁽⁷⁾ a solicitor was instructed by his client to bring an action against book makers for money alleged to be owed by them to the client on a bet. The client insisted on the action being brought against the book-makers although knowing that it was not maintainable in law in the hope that the threat of publicity would induce the book-makers to pay or, if they did not, for the purpose of showing them up. Accordingly, a specially indorsed writ was issued against the book makers by which the money was claimed to be due on an account stated. No account had been stated as the solicitor knew. The client did not know the terms of the indorsement. It was held that the solicitor had committed a contempt of court because the indorsement on the writ was fictitious and was designed to conceal from the court the true nature of the claim. As Lord Goddard said in the case "But to attempt to deceive the court by disguising the true nature of the claim is a contempt. It is putting forward what the old cases called a feigned issue that is to say, not the truth but a fictitious cause of action. We do not think it necessary to go through the many cases cited in argument dealing with contempt of different kinds, nor is it necessary to remind the court that the summary jurisdiction to punish contempt is one to be exercised with caution. It is our opinion beyond question that to disguise a cause of action so as to conceal its true nature when in truth it is one prohibited by a statute is a contempt and as the indorsement was signed in the name of the respondent's solicitor's firm and he admits he was the partner having charge of the proceedings he must take responsibility and be held guilty of a contempt". I need only say that there is a great similarity between that case and our case, because in both cases they were false claims made by barristers by attempting to deceive

the court. In *Linwood v. Andrews & Moore*⁽⁸⁾ the plaintiff Linwood a very young man sued his aunt Louisa Andrews and one Campbell both of whom had great influence on him to recover certain property consisting of bonds alleged to have been made away with by them. The court granted an interim injunction to restrain Louisa from parting with the bonds and was ordered to bring them or the proceeds of them if sold into court. Later Louisa moved to discharge the order. The plaintiff countered this by a Cross Motion to attach Louisa for contempt in not bringing the bonds. Kay J. refused Louisa's application and ordered her committal. The defendant Moore appeared as Counsel for Louisa at the hearings; he was joined by the plaintiff in his action against Louisa where the plaintiff moved the Court to commit Moore to prison for alleged contempt of court – (i) in attempting to obstruct the course of justice by concealing the fact that he had in his possession the bond in question on the date of the service of the writ and injunction against Louisa; (ii) by secretly parting with the bonds to one Watkin deceased, Louisa's solicitor who instructed Moore to appear as Counsel; (iii) by being a party to the hearing on the 1st. April when Louisa moved to discharge the order against her of affidavits which she knew to be untrue; (iv) by inducing Louisa to make an affidavit containing statements which she knew to be untrue and (v) by endeavouring to prevent the plaintiff deriving any benefit from the order directing Louisa to bring the bonds or proceeds into court. It transpired that in Louisa's motion to set aside the order, ordering her to bring the bonds into court she had made an affidavit stating that she did not know what had become of the bonds and that "neither her solicitor, agent, trustees nor anyone else held the same on her behalf" which affirmation was completely false and untrue but were made on the advice of Moore, when the bonds were in fact kept in Moore's house, deposited there by Louisa with his concurrence. The court found Moore guilty of contempt and this is what Kay J. said:

"I must express my deep regret to have to deal with a case of this kind and to find it unnecessary to call for any reply from the plaintiff's Counsel. I have no doubt that Moore conspired with Watkin & Campbell who had done their utmost to baffle the court, and although he denied it, I believe that he knows a great deal more about these affidavits than he has yet told the court and he is quite as guilty of the fraud that has been practised on the court as Watkin. This was the impression conveyed to my mind when Moore was in the box, and a more barefaced attempt to impose upon the court by fraud and suborned perjury I have never seen. I should be wanting in the duty I owe to society if I did not mark my disapprobation of such con-

duct in the strongest manner. It is my painful duty – I say with great pain and reluctance – to order the defendant Moore to be imprisoned for contempt. In my opinion, he knows more than he has disclosed and if he will take a word of advice from the court, I should advise him to make known all the facts he knows in connection with this extraordinary case. The result of three such men as Campbell, Watkin and Moore acting together is that the Argentine bonds have been sold by Watkin and the other bonds are not forthcoming. Watkin has died since the commencement of this action. Nothing has been obtained from his estate except an order for payment of £500/-. The loss of the plaintiff is of everything except this £500/-. That loss had been brought about to a great extent by Moore's conduct. Had he behaved like an honest man – not to say as a barrister and a gentleman – when he knew that affidavits were going to be used containing matter amounting to chicanery, he would have disclosed the facts to the court. He has not done so. I was told that the arm of the court was so short that it could not reach him and that all that he had been guilty of was in not having thrown up his brief. This is not my opinion of the law. The fault lies, not in not having thrown up his brief, but in having made himself a party to a fraud by conspiring with Watkin in inducing the defendant Andrew to make the affidavits which were used to delude the court. I accordingly order Moore to pay the cost of the motion and to be committed to prison till further order and the documents to be impounded."

I need only to echo what Kay J. had said in that case that Moore's act of preparing the false and untrue affidavit and reading of it in court is similar to the affidavit of the 3rd. defendant prepared by the 2nd. defendant and reading his submission in court, falsely stating that the 3rd. defendant bought the land.

Under Order 52 Rule 1(1) of the High Court Rules 1980 it is provided that the power of the High Court to punish for contempt of court may be exercised by an order of committal in Form 110 where contempt of court (a) is committed in connection with (i) any proceedings before the High Court or (ii) criminal proceedings, except where the contempt is committed in the face of the court or consist of disobedience to an order of the court or breach of an undertaking to the court or (iii) proceedings in a subordinate court or (b) is committed otherwise than in connection with any proceedings, then subject to para (4) an order of committal may be made by the High Court. Rule 4 says that

"Nothing in the foregoing provisions of this order shall be taken as affecting the power of the High Court to make an order of committal of its own motion against a person guilty of contempt of court."

Rule 8 says

"Nothing in the foregoing provisions of this order shall be taken as affecting the power of the court to make an order

requiring a person guilty of contempt of court, or a person punishable by virtue of any written law in like manner as if he had been guilty of contempt of the High Court, to pay a fine or to give security for his good behaviour, and those provisions, so far as applicable, and with the necessary modifications, shall apply in relation to an application for such an order as they apply in relation to an application for an order of committal."

Owald on Contempt (Para 3rd. Ed. at Pg 22) says

"In cases of assaulting or abusing a process server or speaking scandalous words of the court an order was made for immediate committal, upon *ex parte* motion supported by an affidavit of the facts, and upon contempt in the face of the court an order of committal was made *instanter* as at present".

The *Supreme Court Practice* (1979 Vol. 1 para. 52) which is *in pari materia* with our High Court Rules 1980 cited the two cases above of *Weisz* and *Andrews* as contempt in the face of the court which are treated as criminal as distinguished from civil contempt punishable summarily. Hitherto a criminal contempt must be for a fixed term and the court has no jurisdiction to discharge the prisoner before its expiry (commentary therein in para 52/112) but this is no longer the rule. Under English law there was previously no right of appeal to a criminal contempt but this had been abolished by statute under section 13 of the Administration of Justice Act 1960.

I am not aware however of the existence of any similar statute in our law. It would appear therefore that the defendant have no right of appeal. The distinction still lies in the fact that in criminal, as distinguished from civil contempt, it cannot be waived by the parties. That to act in contempt "in the face of the court" is the same as contempt which the court can punish "of its own motion" is stated in Lord Denning's judgment in *Balogh v. St. Albans*⁽⁹⁾. He explained

"Gathering together the experience of the past, then whatever expression is used, a Judge of one of the superior courts or Judge of Assize could always summarily, of its own motion, for contempt of court whenever there was gross interference with the course of justice in a case that was being tried or about to be tried, or just over, no matter whether the Judge saw it with his own eyes or it was reported to him by the officers of the court or by others — whenever it was urgent or imperative to act at once. This power has been inherited by the Judges of the High Court and in turn by the Judges of the Crown court. To show the extent of it I will give some instances". He then cited "in the sight of the court" as an example.

He then went on

A "The power of summary punishment is a great power but it is a necessary power. It is given so as to maintain the dignity and authority of the court and to ensure a fair trial. It is to be exercised by the Judge of his own motion only when it is urgent and imperative to act immediately so as to maintain the authority of the court, to prevent disorder, to enable witnesses to be free from fear and jurors from being improperly influenced and the like. It is of course to be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt but properly exercised it is a power of the utmost value and importance which should not be curtailed".

B

I need only say this regarding what Lord Denning had just said. If the court had not acted urgently it is only because the offence, in so far as the Sessions Court is concerned, it only became known after this trial began, and as far as this court is concerned, it was felt that to deal with the question of contempt first might adversely affect the prior disposal of the suit itself. The two above cited cases of *Linwood* and *Weisz* are certainly authority for saying that the question of urgency is relative to the event, because even in those cases, from the circumstances, the offence could not have been discovered until well after the case was over when the order of committal was nevertheless made.

C

D

The defendants' misdeeds are acts of contempt of the worst kind that the court can possibly think of, because in seeking to achieve their evil end and insatiable greed they made the court the subject of their deception and mischief. The extreme culpability of their ill-doing lay in the fact that the trust and confidence which the court places on them as lawyers had been used only to defile that trust by acting to deceive the court thereby becoming the subject of their mockery ridicule and contempt.

E

G The court can dispense with justice only if counsel will not mislead, otherwise justice will suffer from the infirmity of the court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of lawyers if the court itself, in which he seeks redress is no longer safe to be in the same hands. To me the defendants' act is even more despicable because it is an expressed advocate & solicitors rule that counsel shall not practice deception on the court (Rule 17). They have by falsely representing that the 3rd. defendant was the owner of the land acted in utter defiance and disregard of the court and the rules of their own profession.

H

I

In my view for the extremely grievous crime which they have committed against the court the defendants must duly suffer the extreme punishment of imprisonment which I do, by committing

them to prison for a period of 2 years. I do not see, why if a term of 2 years had in a recent case been imposed on a barrister for committing a breach of trust, against a member of the public, on a plea of guilty, the same term should not be imposed on the defendants who have committed a much more serious offence of deceiving, or attempting to deceive the court. I shall nevertheless by virtue of section 6(1) of the High Court rules, suspend the order till after the final disposal of this suit, on sufficient security being furnished by them to the Senior Assistant Registrar for their appearance in this court to abide by the order of committal.

I should like in passing to record my appreciation of the invaluable assistance which has been rendered by Counsel on both sides in this case. I would particularly like to mention Mr. Cashin but for whose tireless and tenacious effort this case would never have seen the light of day. It is regrettable if my decision had revealed itself rather later than what had been reasonably expected but I can assure all concerned that no harm was intended. The voluminous documents I had to go through and the lengthy submissions I had to pore at, not to mention that my present task takes me constantly to everywhere but in fact to nowhere, that it seems to me that delay is somewhat just possible and inevitable.

Order accordingly.

Solicitors: *Subra Naicker & Co.; Allen & Gledhill; Shearn Delamore & Co.; Wong & Paramjothy.*

PUBLIC PROSECUTOR v. SALLEH BIN SAAD

[O.Cr.J. (Syed Agil Barakbah J.) June 17 & 20, 1979]

[Alor Star – Kedah Criminal Trial No. 43 of 1977]

Dangerous Drugs – Trafficking in 19,364 gms. of raw opium and 8,093 gms. of morphine, charge of – Drugs found in bags concealed in car – “anything whatsoever containing any dangerous drug” – Whether this refers to motorcar – Defence failed to raise reasonable doubt on prosecution case – Dangerous Drugs Ordinance, 1952, ss. 12(2) & (3), 33, 37A(1) 39B(1)(c).

The accused was charged for trafficking in dangerous drugs on his own behalf to wit, 19,364 gms. of raw opium and 8,093 gms. of morphine at an unnumbered house at Kampong Tengah, Mukim Keplu, Kedah on October 11, 1976. At the close of the case for the prosecution, the learned trial judge amended the charge to 2 charges, viz., for trafficking in the amount of morphine and for being in possession of the same amount of raw opium under section 12(2) and punishable under section 12(3) of the Dangerous Drugs Ordinance, 1952.

The facts revealed were as follows. On the day in question, at 7.00 a.m. on information received, Superintendent of Customs (P.W.3) accompanied by Senior Customs Officer (P.W.4) and other Customs Officer raided the accused's house. There was a car parked under the house and with the keys obtained from the accused P.W.4 unlocked the front door of the car and commenced to make a search. He found 2 sacks containing blocks of morphine (a dangerous drug under Part III First Schedule of the Ordinance as proven by the evidence of the Government Chemist) under the bonnet of the car. They were placed on either side of the engine compartment. On being questioned by P.W.3 as to the contents of the 2 sacks, the accused replied “morphin sembilan ketul semuanya”. P.W.3 noticed that the accused looked frightened. The accused then pointed to a spot 15 feet away from the car where another sack was lying among other goods. When P.W.3 asked as to the contents of the sack, the accused replied “chandu sebelas ketul”. This was subsequently proven by the Government Chemist to be raw opium, a dangerous drug under Part I, First Schedule of the Ordinance.

The defence was a denial of the alleged admissions but not the discovery of the drugs at the places stated, and as to the amount and nature thereof. An objection was also raised by the defence regarding the admissibility of the accused's admissions having regard to the words “after his arrest” appearing in section 37A(1) of the Ordinance. The court was also faced with the question as to whether the words “anything whatsoever containing any dangerous drug” refer to the motorcar. If so, the presumption that the accused was in possession and to have known the nature of such drug arose thereby requiring the defence to prove to the contrary on the balance of probabilities.

Held: (1) the words “after his arrest” appearing in section 37A(1) of the Ordinance mean after actual arrest and not constructive arrest. It was therefore unnecessary for P.W.3, a Senior Customs Officer, to administer the statutory caution as required under the same sub-section to the accused. The accused's admissions were therefore admissible;

(2) in the present case the motorcar in question was not the container that contained the morphine but the 2 sacks which were used to keep the blocks together were the containers. The presumption under section 37(d) therefore did not apply;

(3) the facts in issue clearly showed the accused did an act preparatory to or for the purpose of trafficking in morphine. He also had knowledge and was in conscious possession of the opium found on the floor of his house.

(4) in the light of the circumstances, the defence had not raised any reasonable doubt to the prosecution case. The accused was guilty on both charges and should be convicted; as he was most probably a carrier of drugs, the sentence of life imprisonment with effect from the date of arrest was justifiable and a deterrent.

Cases referred to:

- (1) *Poon Heong v. Public Prosecutor* [1949] M.L.J. 114.
- (2) *Tong Peng Hong v. Public Prosecutor* [1955] M.L.J. 232.